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creating a new class each time a new lease is signed, and remove the protections that the statute offers against unfair and nonuniform changes in rent.

* * *

Because the defendants have violated G. L. c. 140, § 32L (2), damages are governed by G. L. c. 93A.

Id. at 24, 26-29, 33. The SJC also held that the AG's interpretation as set forth in the amicus letter was "consistent with [their] interpretation of § 32L(2)." Id. at 29. The SJC's interpretation of § 32L(2) in Blake opened the door to actions such as this one. In at least partial response to Blake, Plaintiffs sued the owners and operators of the Oak Point Manufactured Housing Community in Middleborough, Massachusetts alleging that the Oak Point rent structure—a non-uniform structure—was unlawful. See Doc. No. 11.

As described by Plaintiffs, the Oak Point rent structure sets rent "based on a resident's or tenant's date of entry into the community," such that new entrants are charged higher rents even when they are "leasing home sites and receiving services similar to the home sites leased or services received by existing residents or tenants." Doc. No. 11 ¶¶ 31-32. The leases are for lifetime occupancy with the only annual rent increases based on the annual percentage change in the consumer price index. See Doc. No. 29-1 at 6-15.

According to Plaintiffs, this rent structure has produced dissimilar rents for similar classes of Oak Point tenants in violation of Chapter 93A, § 9 and Chapter 140, § 32L(2). Doc. No. 11 ¶¶ 118-24, 132-38. Defendants assert that they are not subject to liability because Chapter 93A, § 3 exempts "actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth." See Doc. No. 78. Defendants argue that the exemption applies to the Oak Point rent structure because the rent structure has been permitted by the Middleborough Rent Control Board ("the Board"). Id.

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The Board was established by the Massachusetts Legislature through the Special Act of 1985, which was enacted to address the "emergency . . . created by high and unwarranted rental increases imposed by some park owners of mobile home parks." Doc. No. 78-2 at 1. Such increases were deemed a risk to the "public safety, health and general welfare of the citizens of [Middleborough], particularly the elderly." <u>Id.</u> Under Section 2 of the Special Act, the Legislature authorized the creation of a Middleborough rent board to regulate "rents, standards and evictions" of mobile home park accommodations to "remove hardships, or correct inequities for both the owner and the tenants." <u>Id.</u> at 1-2. When regulating rent, Section 3 authorized the Board to consider the need to guarantee a fair net operating income for mobile home park owners, including how changes to property taxes, maintenance expenses, and other conditions may impact owners. <u>Id.</u> at 2. The Special Act of 1985 made no mention of either Chapter 140 or any authority of the Board to enforce or interpret its provisions. <u>Id.</u> at 1-3.

The Board first confronted the issue of Oak Point's rent structure in 1998 when Saxon Partners, the developer and initial owner of Oak Point, submitted a rent proposal to the Town regarding the then-planned Oak Point MHC. Doc. No. 88-9 at 13; see Doc. No. 89 at 2. The proposal described the rent structure still in place at Oak Point today—lifetime leases in which the base rent is set at the time of the tenant's arrival to Oak Point and the only permitted increases are annual adjustments based on changes to the consumer price index. Doc. No. 78-1 at 11-12. Over the course of several meetings that year, the Board discussed the Oak Point rent structure, but ultimately decided not to vote on the proposal nor take any formal action. Id. at 8-12, 26-28. At the same time, the Board made no effort to adjust the proposal nor prevent its implementation. Id. at 26-28. Without restrictions imposed by the Board, Saxon Partners implemented the proposed rent structure at Oak Point.

In 2009, the issue of Oak Point's rent structure again came before the Board. <u>Id.</u> at 54. The rent structure was raised during the Board's drafting and ultimate passage of the Rules and Regulations for Mobile Home Park Accommodations, Rent, and Evictions ("the Middleborough Rules"), which explicitly set forth maximum rent requirements under Section 2, "Maximum Rent." <u>Id.</u> at 70-80. Section 2 states that the maximum rent for a new manufactured home may "be higher or lower than the maximum rent for other mobile homes in the park when the rental housing agreement is made." <u>Id.</u> at 72-73. For manufactured homes which were previously owned, the maximum rent—established by a new agreement—shall not exceed either (1) the rent being offered to purchasers of new manufactured homes (in cases where the MHC owner is selling new manufactured homes at that time) or (2) the highest rent being paid by other tenants (in cases where the MHC owner is not selling new manufactured homes at the time). <u>Id.</u> Once the annual base rent has been established, further increases must be approved by the Board or based on the annual change in the consumer price index as approved by the Board or as provided in the rental agreement. <u>Id.</u> at 73. The governing rules in place today, most recently amended in 2013, retain the original language of Section 2. <u>Id.</u> at 131-32; Doc. No. 79 at 17.

In 2011, Defendants purchased Oak Point and continued to implement the original rent structure put in place by Saxon Partners, the same structure currently challenged by Plaintiffs. Doc. No. 11 ¶¶ 30-32. The Oak Point rent structure was, and continues to be, compliant with Section 2 of the Middleborough Rules. The heart of the present dispute is whether compliance with the Middleborough Rules entitles Defendants to an exemption under Chapter 93A, § 3. Defendants argue that they are exempt under § 3 because the Middleborough Rules "permit" the Oak Point rent structure within the meaning of that statute. See Doc. No. 79. In opposition, Plaintiffs assert that regardless of whether Oak Point's rent structure is compliant with the

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Middleborough Rules, the Board lacked the authority to permit the structure in the first place and, accordingly, Defendants have no right to the § 3 exemption. See Doc. No. 89.

II. DISCUSSION³

The parties agree that if Defendants are entitled to the § 3 exemption, Claims II and IV of the First Amended Complaint must be dismissed. Alternatively, if Defendants are not entitled to the exemption, Defendants' motion must be denied; Defendants' Fourth, Seventeenth, and Eighteenth Affirmative Defenses must be struck; and the Court would later determine whether, under § 32L(2), Defendants are in fact charging dissimilar rents for similar classes of tenants without sufficient justification. As explained in the discussion that follows, the Court finds that the exemption does not apply because the Oak Point rent structure is not "permitted" within the meaning of Chapter 93A, § 3. At present, the Court takes no position on the ultimate § 32L(2) merits dispute. Several reasons support the conclusion that the exemption does not apply.

First, Defendants have failed to show more than a related or overlapping regulatory scheme. As such, they do not meet their "heavy" burden of proving the § 3 exemption applies.

Aspinall v. Philip Morris, Inc., 902 N.E.2d 421, 424 (Mass. 2009). Courts are not to apply the exemption lightly. Ducat v. Ethicon, Inc., No. 4:21-CV-10174-TSH, 2021 WL 5749856, at *1 (D. Mass. June 4, 2021). To meet their burden, Defendants must show "more than the mere existence of a related or even overlapping regulatory scheme that covers the transaction. Rather, [Defendants] must show that such scheme affirmatively permits the practice which is alleged to be unfair or deceptive." Aspinall, 902 N.E.2d at 424 (emphasis in original, citations omitted).

That permission must come from a "regulator authorized to review the defendant's actions" who,

³ The Court acknowledges that there are differences in meaning between "tenants" and "residents." Those differences do not bear upon this decision. The Court has adopted the term "tenants" where applicable for the sake of simplicity.

in turn, has "determined that those actions, in particular, were not unfair or deceptive." <u>O'Hara v. Diageo-Guinness, USA, Inc.</u>, 306 F. Supp. 3d 441, 454 (D. Mass. 2018), <u>on reconsideration</u>, 370 F. Supp. 3d 204 (D. Mass. 2019).

While it is true that the Oak Point rent structure complies with the Middleborough Rules and that the Board was well-aware of the Oak Point structure by the time the rules were passed, those rules express no binding determination over whether Defendants are separately compliant with § 32L(2). The Special Act of 1985, which established the Board, does not explicitly or impliedly authorize the Board to determine what is sufficient to rebut the presumption of unfairness under § 32L(2). Similarly, that law vests no authority in the Board to interpret, apply, or enforce § 32L(2) or any other provision of Chapter 140. Certainly, the Legislature did authorize the Board to regulate rents in ways that consider both tenant rights and the financial needs of operators, and the SJC has instructed rent control boards to "be mindful" of § 32L(2). Chelmsford Trailer Park, Inc. v. Town of Chelmsford, 469 N.E.2d 1259, 1264 (Mass. 1984). Nonetheless, that existing authorization and instruction decidedly fall short of authorizing the Board to determine whether classes of tenants are "similar" within the meaning of § 32L(2) or whether non-uniform rents are justifiable under § 32L(2). That fact-specific inquiry is not something the Board is authorized to do. Thus, the Board's regulations do not (and could not) "permit" the rent structure at Oak Point within the meaning of Chapter 93A, § 3. Rather, the Board is administering a related or overlapping rent control scheme through its regulations. Such a showing is insufficient to meet Defendants' heavy burden and, therefore, the exemption does not apply.4

⁴ Moreover, the AG's regulations do not "expressly proclaim[]" that rent increases authorized by rent control laws are "permitted," as Defendants argue. Doc. No. 95 at 12-13. The principles of statutory interpretation require that the regulations be construed according to their plain

Second, § 32L(2) plainly creates substantive rights for tenants of manufactured housing communities that cannot be impaired by local governments. As previously described, § 32L(2) was added to the MHA as part of a package designed to protect the rights of tenants. The need for such rights was rooted in the Legislature's understanding that those tenants—often of fixed-or low-income status, such as the elderly or single parents—were vulnerable. Blake, 158 N.E.3d at 27-28. The Legislature sought to address these concerns by establishing a specific right with an associated cause of action. See Mass. Gen. Laws ch. 140, § 32L(7).

The text of § 32L(2) creates a legal standard against which non-uniform rent structures are to be measured. Under subsection two, a change in rent which does not apply uniformly to all "manufactured home residents of a similar class" is presumptively "unfair." Id. § 32L(2). Subsection six goes on to provide that "[a]ny rule . . . which is unfair or deceptive or which does not conform to the requirements of this section shall be unenforceable." Id. § 32L(6). Subsection seven endows plaintiffs with the ability to vindicate those rights by stating that "[f]ailure to comply with the provisions of sections thirty-two A to thirty-two S, inclusive, shall constitute an unfair or deceptive practice under the provisions of [Chapter 93A, § 2(a)]. Enforcement of

language. Mass. Fine Wines & Spirits, LLC v. Alcoholic Beverages Control Comm'n, 126 N.E.3d 970, 975 (Mass. 2019). Here, Defendants misread the plain language of the applicable regulation, 940 Code Mass. Regs. 10.02. As relevant to this case, subsections two and seven of 10.02 set forth, respectively, that MHC operators must abide by § 32L(2) and that MHC rent increases must be allowed by rent control laws where they exist. Subsection eight, which Defendants take out of context, only applies to a subset of rent increases and only concerns when such increases are "unfair." This regulation does not encompass let alone "permit" rent increases which violate § 32L(2). Indeed, following Defendants' interpretation of the regulations would result in a municipal rent control law rendering any rent increase "permitted" despite the express provisions of the governing statute and the regulations. Such an outcome would contradict the well-established direction that courts not construe statutes in ways that reach "absurd" results when sensible construction is available. Commonwealth v. Tinsley, 167 N.E.3d 861, 869 (Mass. 2021).

compliance and actions for damages shall be in accordance with the applicable provisions of [Chapter 93A, §§ 4–10]." <u>Id.</u> § 32L(7).

Viewed together, these provisions of Chapter 140, §32L create a comprehensive structure to protect tenant rights. Subsection two creates a substantive legal standard against which to judge non-uniformity in rent, subsection six renders unenforceable any rules that violate subsection two, and subsection seven authorizes a cause of action to enforce the foregoing legal rights. Plainly, these provisions vest MHC tenants with substantive rights, which, in certain circumstances, afford them protection from non-uniform rent structures.

That the right is not unqualified—because its presumption of unfairness is rebuttable—does not make it any less of a right. Indeed, the bedrock constitutional right against government searches of private homes is itself not unqualified because it is limited only to prohibiting "unreasonable" searches, yet it is undoubtedly a right. See U.S. Const. amend. IV. Moreover, that the plaintiffs in Blake successfully challenged a non-uniform rent structure as a violation of § 32L(2) through Chapter 93A demonstrates that, in passing § 32L(2), the Legislature created a right. See Blake, 158 N.E.3d at 33.

Under Article 89, § 7(5) of the Constitution of the Commonwealth, cities and towns do not have the authority "to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power . . .". Mass. Const. art. 89, § 7(5). Consequently, Middleborough does not have the authority to modify or impair the substantive rights afforded by § 32L(2). Nor does the text of the enabling act of the Middleborough Rent Control Board—the Special Act of 1985—authorize Middleborough to step in and administer those rights.

Lastly, Defendants' interpretation proves too much. Under Defendants' theory, a rent control board concededly lacking the authority to enforce § 32L(2) could pass MHC regulations separating similar tenants into different rent classes without sufficient justification in contravention of § 32L(2) and, in doing so, could effectively (1) insulate the MHC owner from a Chapter 93A action challenging the rent structure and (2) preclude all future MHC tenants from challenging the legality of the rent structure under Chapter 93A. The Court rejects an interpretation resulting in such an outcome. Such an interpretation would preclude judicial review, disregarding long-standing authority that the "duty of statutory interpretation rests ultimately with the courts." Blake, 158 N.E.3d at 26 (citations omitted, emphasis added).

Of course, municipal rent control regulations are not irrelevant to the § 32L(2) analysis. To the contrary, the SJC has held that rent control boards must consider § 32L(2). Chelmsford

Trailer Park, Inc., 469 N.E.2d at 1264. Various provisions of the AG's regulations reference and, in some sense, defer to municipal rent control determinations. See 940 Code Mass. Regs.

10.02(7), 10.02(8)(c) (1996). Rent control in Middleborough, as set forth in the Special Act of 1985, is meant to protect tenants and assure a reasonable income for the owner, objectives that are not dissimilar to those of the MHA. Blake, 158 N.E.3d at 30. The Middleborough Rules are

⁵ A simple example building on <u>Blake</u> illustrates this point. Suppose a town with a rent control board enacted an MHC regulation authorizing a ninety-six dollar per month increase for all new tenants and, in response, an MHC operator implemented that rent structure. While current tenants could avail themselves of a Chapter 30A appeal of those regulations, they likely would have no reason to do so as their rent remained unchanged. Future tenants—the people who would be subject to the increase upon moving to the MHC—would likely lack both the standing and the interest to file an appeal at the time the regulations were adopted. If, after moving to the MHC, those tenants decided to challenge the non-uniform rent structure as a violation of § 32L(2), Defendants' interpretation would require a court to dismiss those claims without reaching the merits because the rent structure was compliant with the regulations and, thus, exempt under § 3. ⁶ To be sure, the Court is not saying that Defendants have failed—or succeeded—to rebut the presumption of unfairness outlined in § 32L(2). At present, the Court only holds that the exemption does not apply.

certainly relevant—possibly even quite weighty—to the issues presented in this suit, but as a matter of law, they do not exempt Defendants from liability nor do they insulate the Oak Point rent structure from judicial review.

For these reasons, Defendants' Motion for Judgment on the Pleadings is DENIED.

Turning to the Plaintiffs' Cross-Motion, the Court notes that even when viewing the matter under the defendant-friendly standard, the resolution of the issues remains the same. Therefore, the Court ALLOWS Plaintiffs' cross-motion.

III. CONCLUSION

For the foregoing reasons, Defendants are not entitled to a § 3 exemption. At present, the Court makes no determination as to whether the rebuttable presumption under § 32L(2) has been met. Accordingly, Defendants' Motion for Partial Judgment on the Pleadings (Doc. No. 78) is DENIED, and Plaintiffs' Cross-Motion for Judgment on the Pleadings (Doc. No. 88)—striking Defendants' Fourth, Seventeenth, and Eighteenth Additional Defenses—is ALLOWED.

SO ORDERED.

/s/ Leo T. Sorokin Leo T. Sorokin United States District Judge

⁷ The Court notes that no party has suggested that the resolution of either motion turns on in whose favor the Court draws inferences. Such is the case especially given that the dispositive questions are legal in nature.

14

Applicant Details

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Date of BA/BS May 2021

JD/LLB From The George Washington University Law

School

https://www.law.gwu.edu/

Date of JD/LLB May 19, 2024

Class Rank 5%
Law Review/Journal Yes

Journal(s) The George Washington Law Review

Moot Court Experience Yes

Moot Court Name(s) Arnold & Porter Government Contracts

Moot Court

Bar Admission

Prior Judicial Experience

Judicial Internships/
Externships Yes

Post-graduate Judicial No

Law Clerk

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

ETHAN SYSTER

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June 10, 2023

The Honorable Juan R. Sanchez United States District Court for the Eastern District of Pennsylvania 14613 U.S. Courthouse 601 Market Street Philadelphia, PA 19106

Dear Chief Judge Sanchez:

I am a law student at The George Washington University Law School and will be graduating in May 2024. I am writing to apply for a judicial clerkship with you for the 2024-2025 term. I am enclosing a resume, law school transcript, and a writing sample. Also enclosed are letters of recommendation from Professor Peter Smith, Professor Katya Cronin, and Board Judge Marian Sullivan. I would be happy to provide additional information upon request. Thank you for your consideration.

Sincerely,

Ethan Syste

Ethan Syster

ETHAN SYSTER

500 23rd St. NW Apt. B406 Washington, DC 20037 | (910) 685-6559 | ethansyster@law.gwu.edu

EDUCATION

The George Washington University Law School

Washington, D.C.

May 2024

J.D., expected Honors: George Washington Scholar (Top 1%-15% of class to date); GPA: 3.979

Journal: The George Washington Law Review, Articles Editor

Activities: Research Assistant to Professor Peter Raven-Hansen (Spring 2023);

Arnold & Porter Government Contracts Moot Court (2023 Winner, 2024 Co-Chair);

Writing Fellow (2022-2023);

Government Contracts Student Association (President 2023-2024); Alternative Dispute Resolution Board (Social Co-Chair 2022-2023)

The University of North Carolina at Chapel Hill

Chapel Hill, NC

May 2021

B.A., *summa cum laude*, in Political Science and Economics Leadership: Honor System Outreach (Managing Editor);

Epsilon Tau Pi (Eagle Scout Service Fraternity) (Secretary)

Activities: Undergraduate Student Attorney General's Office; Carolina Union Activities Board

EXPERIENCE

The George Washington University Law School

Washington, D.C.

Student-Attorney for Civil Access to Justice Clinic, Family Law Division

(Upcoming) Fall 2023

Covington & Burling, LLP

Washington, D.C.

Summer Associate

May 2023 – Present

- Research legal issues including pro bono criminal matters, antitrust, and procurement law.
- Draft memoranda communicating research to supervising attorneys.
- Collaborate with attorneys and staff to research solutions to novel legal issues.

U.S. Court of Federal Claims

Washington, D.C.

Judicial Intern, Chambers of the Honorable David A. Tapp

 $January-April\ 2023$

- Researched legal issues including takings law, administrative law, and procedural issues.
- Communicated legal research and analysis to clerks and the judge through legal memoranda.
- Edited and proofread judicial opinions, orders, and other communications.

U.S. Civilian Board of Contract Appeals

Washington, D.C.

Student Law Clerk

September – November 2022

- Researched legal issues including government contracts changes, delays, and terminations.
- Drafted memoranda assisting board judges in preparing for hearings and arbitrations.
- Worked collaboratively with clerks, board judges, and other staff to draft orders and opinions.

U.S. Department of Homeland Security, TSA, Office of the Chief Counsel

Washington, D.C.

Legal Intern (Acquisitions, Property, and Other Transactions)

May – July 2022

- Researched procurement law matters, including contract formation and administration issues.
- Wrote memoranda to communicate legal research and analysis to supervising attorneys.

INTERESTS

- Volunteering with the Boy Scouts of America (Eagle Scout).
- Volunteering with the Washington Lawyers' Committee Workers' Rights Clinic.
- Hiking the Appalachian Trail; Listening to true crime podcasts.

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Spring 2023

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THE GEORGE WASHINGTON UNIVERSITY

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Page: 2

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Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

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GU	Georgetown University	TC	Trinity Washington University
GL	Georgetown Law Center	USU	Uniformed Services University of the
GMU	George Mason University		Health Sciences
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; B, Good; C, Satisfactory; D, Low Pass; F, Fail; I, Incomplete; IPG, In Progress; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; P, Pass; NP, No Pass; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the I is replaced by the final grade. Through Summer 2014 the I was replaced with I and the final

Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.

Effective Fall 2003: The grading symbol R indicates need to repeat course. Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a

grade of I, the grade is replaced with I/ and the grade.

Effective Fall 1987: The following grading symbols were added: A-, B+, B-, C+, C-, D+, D-.

Effective Summer 1980: The grading symbols: P, Pass, and NP, No Pass, replace CR, Credit, and NC, No Credit.

(Excludes Law and M.D. programs.) A, Excellent; B, Good; C, Minimum Pass; F, Failure; I, Incomplete; IPG, In Progress; CR, Credit; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of *I*, the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

Effective Fall 1994: The following grading symbols were added: A-, B+, B-, C+, C- grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; B+, B, B-, Good; C+, C, C-, Passing; D, Minimum Pass; F, Failure; CB, Credit; NC, No Credit; I, Incomplete. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

M.D. Program Grading System

M.D. Program Grading System
H, Honors; HP, High Pass; P, Pass; F, Failure; IP, In Progress; I, Incomplete; CN,
Conditional; W, Withdrawal; X, Exempt, CN/P, Conditional converted to Pass; CN/F,
Conditional converted to Failure. Through Summer 2014 the I was replaced with I and the

For historical information not included in the transcript key, please visit

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The Honorable Juan Sanchez James A. Byrne United States Courthouse 601 Market Street, Room 14613 Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my pleasure to write this letter in strong support of Ethan Syster's application for a clerkship in your chambers. I am writing in my capacity as Ethan's Fundamentals of Lawyering Professor. Fundamentals of Lawyering is GW Law's required first-year legal research and writing class, in which students spend two semesters learning numerous foundational skills for the practice of law. As such, I have come to know Ethan well over the course of his 1L year and have no doubt that he would be a great asset to your chambers.

Ethan was one of the top students in my class last year, across two sections. He is extremely bright and always up to any challenge. In the fall semester, for example, he was the only student in my sections who chose to argue for the more difficult position on his closed research memorandum. Despite starting from a disadvantaged position, Ethan produced an exceptional draft, which received the highest grade in the entire class. Ethan likewise did not shy away from taking on a difficult question in class and was always eager to participate and contribute to our discussions in a very thoughtful and meaningful way.

Ethan also has tremendous work ethic and can do well despite an exceedingly high workload. Throughout his time in my class, he completed every assignment well before the deadline, went above and beyond the basic requirements, and always turned in high quality work product. He is also highly self-motivated and seeks out opportunities both in and out of class to get involved in meaningful projects, to develop essential skills, and to help others. In addition to his summer internship after 1L, he also took on an externship in the Fall of his 2L year and a judicial internship in the Spring of 2L. Alongside being an articles editor for the GW Law Review, he also serves as a Writing Fellow, where he helps first-year students master the skills of legal research and writing and I routinely hear from my current students how patient, clear, and helpful he is to them. In short, anything that Ethan puts his mind to, he does exceptionally well and manages to balance it all with ease and grace.

What impresses me most about Ethan, however, is that his achievements and drive to succeed never come at the expense of others. Not only is he a kind, pleasant, and joyful person, but he is also very mindful of letting other people shine whenever possible and happily takes a back seat, accepts a more challenging assignment, or volunteers for a shorter deadline to make sure his classmates are in the best possible position. He is a natural born leader, inspiring people with his respectful yet sure approach. I have had the opportunity to observe Ethan in numerous group settings, both large and small, and he always naturally emerges as the one others want to follow and emulate.

Ethan's work ethic, curiosity, intrinsic motivation, intellectual rigor, and overall positive attitude make him an excellent candidate for a clerkship in your chambers and I have no doubt that he would greatly contribute to your work.

Thank you for the opportunity to enthusiastically recommend Ethan for this position. Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

Katya S. Cronin

Associate Professor Fundamentals of Lawyering Program The George Washington University Law School katya_cronin@law.gwu.edu (202) 494-8748 June 10, 2023

The Honorable Juan Sanchez James A. Byrne United States Courthouse 601 Market Street, Room 14613 Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write enthusiastically in support of Ethan Syster, a student at the George Washington University Law School who has applied to clerk in your chambers. Ethan was in my Civil Procedure class in Fall 2021 and my Legislation and Regulation class in Spring 2022. Ethan earned an A+ in Civil Procedure and an A in Legislation and Regulation. GW has a strict curve, and I give only a small number of solid A's, let alone A+'s. I was not surprised by Ethan's performance, however; he had consistently offered thoughtful insights during our class discussions. Ethan is a treat to have in class; he does not speak to hear his own voice, but when the class is struggling with a difficult concept, he will get the class back on the right track. Ethan's performance in my classes was not anomalous; his GPA is 3.95, which places him among a tiny number of students at the very top of the class.

Ethan has maintained this superlative level of academic performance while being fully engaged in the law school community outside of class. He is an Articles Editor on the Law Review, which is the most intellectually demanding and time-consuming position on the journal. He also served as a Writing Fellow, a prestigious position that requires excellence in that important craft. He has also served as a Peer Tutor for Civil Procedure and an officer-holder in the Government Contracts Student Association. Yet even though he has considerable demands outside of the classroom, Ethan has continued to receive top grades in his classes.

Ethan will come to a clerkship with meaningful legal experience under his belt. He will spend the summer after his second year of law school at Covington and Burling, a well-regarded firm in Washington, D.C. He spent the summer after his first year of law school in the Office of the Chief Counsel for the Transportation Security Administration at the U.S. Department of Homeland Security. In addition, he has externed during the academic semester—maintaining yet another ball in the air—at the U.S. Civilian Board of Contract Appeals and the U.S. Court of Federal Claims. I am sure that he will be able to hit the ground running in any clerkship.

Finally, Ethan is friendly, outgoing, and charming, and I am confident that he would be an excellent colleague. He is one of our very best. I warmly endorse Ethan Syster's clerkship application, and I hope that you will consider him carefully.

If you have any questions, please feel free to contact me.

Cordially,

Peter J. Smith Professor of Law

Email: pjsmith1@law.gwu.edu Office Phone: (202) 994-4797 June 10, 2023

The Honorable Juan Sanchez James A. Byrne United States Courthouse 601 Market Street, Room 14613 Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in support of Mr. Syster's application for a judicial clerkship. During the Fall 2022, Mr. Syster completed a twelve-week legal clerkship with the Civilian Board of Contract Appeals (CBCA), while he was a second-year student at George Washington University Law School. The CBCA is a board of twelve judges with jurisdiction to decide government contract disputes pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), as well as other matters.

I am responsible for obtaining assignments and supervising the work of the law clerks. The assignments are substantively similar to the work expected in any judicial clerkship and require clerks to conduct legal research and draft orders, opinions, and legal memoranda. Clerks are attend hearings and arbitrations, and are also asked by the judges to participate in status conferences and other interactions with the parties in cases.

Mr. Syster received assignments from four judges on the Board, including myself, and completed six assignments. Mr. Syster wrote legal memoranda analyzing the applicability of different contract clauses in a construction contractor's delay claim and the merits of a motion to dismiss for lack of jurisdiction. Mr. Syster drafted decisions in an arbitration in which the Board was asked to review the denial of public assistance funds by the Federal Emergency Management Agency and on a Federal employee's appeal of a travel reimbursement decision.

We found Mr. Syster's work to be excellent. Mr. Syster's memoranda and draft decisions were well-written, well-organized, and well-researched. His thoughtful analysis assisted the judges in reaching the decisions in the respective cases. In two memoranda that he prepared for me in advance of a mediation, Mr. Syster correctly synthesized the legal principles applicable to the claims at issue and accurately assessed the strengths and weaknesses of the positions taken by the parties. In our discussions about his memoranda and the underlying case material, he articulated a sophisticated understanding of and approach to addressing the claims in mediation.

It was a pleasure to work with Mr. Syster. He is unfailingly professional and polite. His questions about assignments were clear, concise, and relevant. He completed his assignments promptly and demonstrated initiative by researching an additional issue he identified beyond the original parameters of one assignment. Mr. Syster will be an excellent judicial clerk and we highly recommend him for such a position.

Please contact me at (202) 606-8824 or through my chambers email address (sullivan.chambers@cbca.gov), if I may answer any questions or if you would like to speak with any of my colleagues about Mr. Syster's work for the CBCA.

Sincerely,

Marian E. Sullivan

Board Judge Civilian Board of Contract Appeals

ETHAN SYSTER

500 23rd St. NW Apt. B406 Washington, DC 20037 | (910) 685-6559 | ethansyster@law.gwu.edu

The following writing sample is a memorandum I prepared for a Board Judge as part of my externship with the U.S. Civilian Board of Contract Appeals (CBCA). The CBCA hears disputes between government contractors and civilian federal executive agencies pursuant to the Contract Dispute Act, 41 U.S.C. §§ 7101-7109. This memorandum analyzes the applicability of various clauses to a dispute over a delay in a construction contract and was prepared to assist a Board Judge in preparing for mediation between the parties. The Board Judge has given me permission to use this memorandum in its redacted form as a writing sample. I did not receive assistance in preparing this memorandum and the work is entirely my own.



MEMORANDUM

To: Board Judge

From: Ethan Syster

Date: September 30, 2022

Subject: [Contractor] v. [U.S. Agency], CBCA XXXX

Question(s) Presented

Whether the contractor is entitled to the costs it claims under either the Administrative Leave clause or the Suspension of Work clause?

Brief Answer

The contractor is not entitled to costs under either the Administrative Leave clause or the Suspension of Work clause because the facts do not indicate that the Government's action or inaction led to an order to suspend work or to the granting of administrative leave. The only likely claim for costs would be under a constructive acceleration theory arising from the Excusable Delays clause but this is also not a strong claim because the contractor has not shown any refusal to grant an extension or other coercive pressure by the Government

Background

On, October 7, 2015, [Contractor] was awarded a fixed-price construction contract to build a [government building]. Appellant's Notice of Appeal, Claim XX at 1 (hereinafter "Claim XX"). The contracting officer issued a Limited Notice to Proceed on February 26, 2016, with a 30-month Period of Performance and a Contract Substantial Completion Date of August 26, 2018. *Id.* at 1.

A security alert was issued on October 19, 2017, related to civil unrest near the worksite. Claim XX, Reference 01. That afternoon, [Contractor]'s employees at the worksite were dismissed early due to the security concerns. Claim XX at 1. The parties dispute who ordered the early release and shutdown of the worksite, but a "Site Event Report" prepared by [Contractor]'s construction security manager summarizes the decision-making process. The security manager explains that at 16:00 the "looters were next to our site." Exhibit 8. Following gunfire, "the decision was made by the Project Director to stop the work . . . and bring the workers down to the ground level." *Id*. Around 16:40, the security manager ensured the area was clear so that employees could be safely evacuated. Id. All employees were offsite at 17:27. Id. The workday typically ends at 18:00. Exhibit 7 at 3. A project manager of a subcontractor expressed concern that, if the decision to leave the worksite early was made by [Contractor], rather than the Government, "idle resources may not be compensable." Id. The security manager responded with the Site Event Report and explained in the body of the email "while the decision was made by [project manager] and I, there was coordination with [the agency]." Exhibit 7 at 2.

While not explicitly addressed in the claim or the contracting officer's final decision, it can be inferred that [Contractor] employees resumed work at their regularly scheduled time on the morning of October 20, 2017. Later on the morning of October 20, the contracting officer's representative ("COR") emailed [Contractor]'s project manager "FYI-We are following Security guidance and closing the site at 11:00." Claim XX, Reference 02. The project manager responded "Acknowledged. [Contractor] reserves its right to claim ½ day lost time due to civil unrest." *Id.* To which the COR responded with "it is your right in accordance with the contract." *Id.*

[Contractor] submitted a claim for \$XX,XXX as direct and indirect costs resulting from the "[G]overnment-ordered site shut-down and administrative leave." Claim XX.

Dates and party names have been altered to preserve confidentiality.

[Contractor] points to subsection $H.X^2$ of the contract which states "if administrative leave is granted to contractor personnel as a result of conditions stipulated in any 'Excusable Delays' clause of this contract, it will be without loss to the contractor."

The contracting officer issued a final decision denying [Contractor]'s claim. Appellant's Notice of Appeal, Contracting Officer's Final Decision. The contracting officer emphasizes several clauses which put the risk of changed security conditions on the contractor, rather than the Government. *Id.* at 2. The contracting officer points to FAR 52.225-19, which provides that "Contract performance may require work in dangerous or austere conditions. Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations." The contracting officer asserts that the claim should be properly analyzed under the Suspension of Work clause, FAR 52.242-14, which would entitle the contractor to an adjustment for unreasonable delays caused by the Government. In addition, the contracting officer found that, even if [Contractor] were entitled to costs, its claimed damages were calculated inaccurately. Contracting Officer's Final Decision at 3. This memorandum does not address the issue of cost calculation.

Discussion

[Contractor] asserts that the claim should be analyzed under the Excusable Delays and Administrative Leave clauses, which could potentially lead to contractor recovery of direct and indirect costs related to the granting of administrative leave. Conversely, the agency argues that the claim should be analyzed under the Suspension of Work clause, which would entitle the contractor to time, not money. As further explained below, the Excusable Delays and Administrative Leave clauses provide no basis for recovery because there was no constructive acceleration nor any granting of administrative leave. Under the Suspension of Work clause, [Contractor] also likely cannot recover because there was no unreasonable delay caused by the Government.

As an initial matter, [Contractor] argues that the e-mail conversation between [Contractor]'s project manager and the COR guarantees the contractor's recovery. Generally, the Government is only bound by actual authority and not apparent authority. See HTC Industries, Inc., ASBCA 40562, 93-1 BCA ¶ 40,562 (Oct. 30, 1992). (contractor denied recovery where the contracting officer's technical representative acted outside of their actual authority). As stated above, [Contractor] acknowledged the COR's guidance to close the site at 11:00 and responded "[Contractor] reserves it right to claim ½ day of

² Contract clauses have been replaced with fictitious pseudonyms to preserve confidentiality.

lost time due to civil unrest." Reference 02. The COR replied "it is your right in accordance with the contract." Reference 02. It is not clear that the e-mail correspondence supports the interpretation that [Contractor] is asserting. Rather, as the contracting officer's final decision describes, the e-mail conversation seems to logically imply that [Contractor] reserved its right under the contract to file a claim for additional time. Contracting Officer's Final Decision at 3. Regardless of the interpretation of this e-mail exchange, it is not dispositive because the language of the contract, and not the COR's interpretation, determines the contractor's entitlement. Thus, the email exchange does not provide [Contractor] with an independent basis for recovery beyond what is provided in the contract.

I. Excusable Delays and Administrative Leave Clauses

The Excusable Delays and Administrative Leave clauses do not entitle the contractor to recover any amount of money because there was no constructive acceleration or granting of administrative leave. The Excusable Delays clause provides that "the Contractor will be allowed time, not money, for excusable delays as defined in FAR 52.249-10." F.X.X. Examples of excusable delays include situations such as natural disaster and Government action:

(1) acts of God or the public enemy; (2) acts of the United States Government in either its sovereign or contractual capacity; (3) acts of the Government of the host country in its sovereign capacity; (4) acts of another contractor in the performance of a contract with the Government; (5) fires; (6) floods; (7) epidemics; (8) quarantine restrictions; (9) strikes; (10) freight embargoes; and (11) unusually severe weather

The Excusable Delays clause provides that a travel warning or similar document will not, in itself, be sufficient to establish that a security condition prevented performance. F.X.Z.

In Fluor Intercontinental, Inc. v. Department of State, CBCA 1559, 13 BCA ¶ 35,334, the Board found that the contractor, which had been awarded a firm-fixed price contract to design and construct an embassy compound in Haiti, had incurred an excusable delay when an ordered departure led to delays in contract performance. Specifically, the Board found that while the security conditions themselves did not constitute a change to the contract, the ordered departure was an excusable delay. Id. at 173,446. The Board granted costs for constructive acceleration because the contracting officer continually denied the contractor's excusable delay claim and impressed upon the contractor the need for completion with no extension due to excusable delays. Id. at 173,448.

Unlike in *Fluor Intercontinental, Inc.*, here there was no ordered departure and rather the situation upon which the contractor seeks to recover is much closer to the generalized security conditions the Board declined to find as changing the contract. The security conditions described, including the security alert, are similar to the "travel warning, warden message, or similar document or communication" described in F.X.Z as insufficient to constitute an excusable delay. The contract included two clauses placing the risk of changed security conditions on the contractor. *See* H.XX.Y.Z (placing responsibility on the offeror for "visiting the project site and verifying all pertinent site conditions, including the past, current, and future security conditions"); FAR 52.225-19 (noting that "Contract performance may require working in austere conditions" and requiring that "the Contractor accept the risks associated with required contract performance in such operations.") Therefore, the deterioration in security conditions likely does not constitute an excusable delay.

Constructive acceleration requires that the contractor first be faced with an excusable delay and then the Government threaten to terminate or refuse to grant, or delay granting, a time extension. See Intersea Research Corp., IBCA 1675, 85-2 BCA ¶ 18,058 (finding that agency threat to terminate the contract constitutes constructive acceleration); Fluor International, Inc. at 173,446 (finding that delay in granting a time extension following an excusable delay constitutes constructive acceleration). Even assuming there was an excusable delay, [Contractor] has not argued that there was any threat to terminate the contract, delay in granting a time extension, or other coercion by the Government that would lead to a claim for constructive acceleration.

[Contractor] also relies upon the Administrative Leave clause, which provides that, "if administrative leave is granted to contractor personnel as a result of conditions stipulated in any 'Excusable Delays' clause of this contract, it will be without loss to the contractor." H.X.Y. The clause further states that the costs of such leave "shall be a reimbursable item of direct cost hereunder for employees whose regular time is normally charged, and a reimbursable item of indirect cost for employees whose time is normally charged indirectly in accordance with the contractor's accounting policy." Specifically, [Contractor] contends that the Government ordered the site shut-down and administrative leave in response to a security concern, which constitutes an excusable delay under F.X.X. To recover under the Administrative Leave clause, [Contractor] must show, (1) that security conditions are of the type described in the Excusable Delays clause and (2) that administrative leave was granted to contractor personnel. H.X.Y. A similar administrative clause has been interpreted in a case involving layoffs and furlough of contractor employees for a substantial period of time due to the Government's unavailability of funds. See Raytheon STX Corp. v. Department of Commerce, GSBCA 14926-COM, 00-1 BCA ¶ 30,632 (Oct. 28, 1999) (interpreting a similar Administrative

Leave clause in the context of a partial Government shutdown where the contractor sought layoff pay and salary costs for employees affected by the shutdown but ultimately awarding costs upon the cost-reimbursable nature of the contract).

The Government argues that contractor's employees, in working on a fixed-price construction contract, do not qualify as "assigned contractor personnel in Government facilities" under H.X.Z. Unlike the cost-reimbursable contract in *Raytheon STX Corp.*, here the workers' time is not charged to the Government, either directly or indirectly. However, this understanding would render the entire Administrative Leave clause in H.X inapplicable to the Contract and it is unclear why the Government would have included the clause in a fixed-price contract if it was completely inapplicable. Notably, the clause focuses upon "the contractor's accounting policy" rather than the Government's typical liability for paying the wages.

Assuming [Contractor] can show that there was an excusable delay, and that the Administrative Leave clause would apply to [Contractor]'s employees, the dismissal of employees for less than two full days of work as a result of security concerns likely does not constitute administrative leave. Unlike in *Raytheon*, here the employees were sent home temporarily for approximately seven to eight hours of working time as a result of deteriorating security conditions outside of the Government's control. Although the parties debate whether the termination of work was ordered by the Government or the contractor, nowhere in the claim or the contracting officer's final decision does either party address whether the Government specifically ordered that the employees be placed on administrative leave for this period. Thus, the Administrative Leave clause likely does not entitle [Contractor] to relief.

II. Suspension of Work Clause

The Suspension of Work clause is inapplicable because there was no Government-caused unreasonable delay. The Suspension of Work clause, FAR 52.242-14, provides that the contracting officer may suspend work for the convenience of the Government. If a suspension of work is of an unreasonable duration, an adjustment shall be issued for the increased cost of performance. *Id.* The clause specifically provides that no adjustment is to be made when the work is suspended by a cause other than the Government. These requirements are summarized in *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1375 (Fed. Cir. 2003). The Court found that must be a (1) delay of reasonable length, (2) proximately caused by the Government, (3) resulting in injury, and (4) no concurrent delay that is the fault of the contractor. *Id.*

The courts and boards have typically interpreted the first requirement regarding the reasonableness of the delay to focus upon the duration of the delay rather than the purpose of the delay. See, e.g. BCPeabody Constructions Services Inc. v. Department of Veterans Affairs, CBCA 5410, 18-1 BCA ¶ 37,013 (finding 179-day delay to be unreasonable); CTA I, LLC v. Department of Veterans Affairs, CBCA 5826 et al., 22-1 BCA ¶ 38,083 (finding 186-day delay to be unreasonable). As for the second and fourth requirements, the courts and boards have found a delay to be proximately caused by the Government's action or inaction when there is no concurrent delay that is the fault of the contractor. See Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999) (Government failure to obtain necessary permit); BCPeabody Construction Services Inc. (Government failure to prepare dining room for renovation by relocating patients); B.V. Construction, Inc., ASBCA 47766, et al. 04-1 BCA ¶ 32,604 (Government failure to issue a contract modification authorizing payment for additional engineering work necessary to correct errors in Government's plans and specifications). Further, "only delay on a project's critical path results in overall delay." CTA I, LLC, at 184,949.

Here, the delay was not of an unreasonable duration. Unlike in *BCPeabody* Construction Services, Inc., or CTA I, LLC, here the delay was less than two working days and was an appropriate response to the security conditions surrounding the worksite. In analyzing the second and fourth factors concurrently, [Contractor] has not shown that there was a Government-caused delay, rather than a delay caused by the acts of an external third-party. Unlike in Melka Marine where the Government failed to obtain a necessary permit, or in BCPeabody Construction, where the Government failed to relocate patients to allow contractor access to the worksite, here the delay was caused by the acts of thirdparty protestors. While the parties spend much time discussing whether the Government or the contractor ultimately determined that work should be suspended, such a determination is immaterial as to the proximate cause. Regardless of who made the ultimate decision, that decision was based upon the external actions of unaffiliated third parties who created the security concern. The contractor accepted the risk of varying security conditions and agreed with the COR that the conditions warranted temporary closure of the work-site. H.XX.Y.Z; FAR 52.225-19. See also Exhibit 8 (describing [Contractor]'s agreement with the Government to shut-down the site). Thus, the delays were caused by an unaffiliated third-party and [Contractor] likely cannot recover under the Suspension of Work clause because there was no unreasonable delay caused by the Government.

Questions

- 1. If, as the contracting officer asserts, the Administrative Leave clause (H.X(e)) is inapplicable to the contractor personnel, then why was it included in the fixed price contract?
- 2. How did the lack of work on these two days affect project completion time?
- 3. Did the contractor continue work on the morning of October 20, 2017?
- 4. How did the contractor calculate \$XX,XXX in costs?
- 5. Is there any additional evidence regarding whether Government personnel ordered contractor personnel to leave?

Applicant Details

First Name Christopher
Last Name Taylor
Citizenship Status U. S. Citizen

Email Address <u>christopherit491@gmail.com</u>

Address Address

Street

536 West 47th Street, Apt. 14

City New York State/Territory New York

Zip 10036

Contact Phone Number **801-362-2646**

Applicant Education

BA/BS From University of Utah

Date of BA/BS May 2020

JD/LLB From New York University School of Law

https://www.law.nyu.edu

Date of JD/LLB May 18, 2023

Class Rank School does not rank

Law Review/Journal Yes

Journal(s) Moot Court Board (Journal

Equivalent)

Moot Court Experience Yes

Moot Court Name(s) **NYU Moot Court Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/

Externships

No

Post-graduate Judicial Law

Clerk

No

Specialized Work Experience

Recommenders

Billy, Christine christine.billy@gmail.com 917-270-9703
Arlen, Jennifer jennifer.arlen@nyu.edu 212-992-8842
Sharkey, Catherine catherine.sharkey@nyu.edu 212-998-6729

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Juan Sanchez James A. Byrne United States Courthouse 601 Market Street, Room 14613 Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a recent graduate of New York University School of Law, writing to express my interest in a clerkship in your chambers for the 2024-2025 term, or for any other available terms after 2025.

I came to law school after a series of public-interest focused jobs, including work at a United States Attorney's office, at an LGBTQ+ nonprofit, and as a substitute high school teacher. Throughout that time, I developed an important ethic—no matter what job I am doing, my career is most meaningful when I am using my talents to make the world a gentler, more just place to live in. In law school I have tried to follow that creed: in my civil rights work at the Transgender Legal Defense and Education Fund and New York City Human Rights Commission, in my government work at the New York City Law Department, and in the many probono matters I was able to take on during my summer at a firm.

Post-gradation I will be working for Selendy Gay Elsberg, PLLC, a firm I chose for its reputation in hands-on, complex commercial litigation training, its strong commitment to public interest work, and its mission to build a diverse cohort of future litigators. My long-term goal is to return to public interest or government work, and all my mentors have consistently spoken to how important a clerkship can be in that transition, and most saliently, in becoming a valuable litigator in both the private and public sectors.

Attached are my resume, writing sample, and undergraduate and law school transcripts. Letters of recommendation are forthcoming from Professors Jennifer Arlen, Catherine Sharkey, and Christine Billy. I was enrolled in Professor Arlen's 1L Corporations course, and later took her seminar on Corporate Crime, in which I wrote a research paper on a recent Supreme Court decision, United States v. Percoco. Professor Sharkey taught my 1L Torts course and asked me to return as a Teaching Assistant; I also worked with Professor Sharkey to update her syllabus. Professor Billy is a clinical instructor for NYU's NYC Law Department Externship program. During my semester in her clinic, I worked with her colleagues in the Appeals Division of the Law Department, and wrote and presented a pitch on local legislative reform to her and other NYC government officials. My recommenders' contact information:

Jennifer Arlen: ArlenJ@mercury.law.nyu.edu 212.992.8842 Catherine Sharkey: catherine.sharkey@nyu.edu 212.998.6729 Christine Billy: christine.billy@gmail.com 212-998-6703

Thank you for considering me as a candidate for a clerkship. I am excited about the cases you are trying and hope I would be a valuable asset to your chambers.

Respectfully,

/s/ Christopher Taylor

Christopher I. Taylor 536 W. 47 St., Apt. 14 New York, NY 10036 (801) 362-2646 cit6216@nyu.edu

CHRISTOPHER TAYLOR

(801) 362-2646 / (he/him/his) cit6216@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY

Candidate for J.D., May 2023

Honors: Robert McKay Scholar (Top 25% of class after four semesters' cumulative grades)

Moot Court Board (Journal Equivalent), Casebook Associate Executive Editor

CLEA (Clinical Legal Education Association), Outstanding Externship Student Award

Lawrence Green Prize for Best Moot Court Problem (Casebook, Vol. 47)

Activities: HIV Law Society, Housing Works Student Advocate

Identity Documents Project Student Advocate

SBA Corporations Peer Tutor

Law and Government Society Student Mentor OUTLaw Board, Professional Development Co-Chair Teaching Assistant for Professor C. Sharkey (Torts)

UNIVERSITY OF UTAH, Salt Lake City, UT

B.A., summa cum laude, May 2020

Majors: Comparative Literary and Cultural Studies; German Studies

Senior Thesis: Scheherazade's Vienna: Erotic and Thanatic Figures in von Hofmannsthal and Schnitzler
Honors: Honors College Graduate, Dean's List (4 semesters), Eta Sigma Phi Classics Society
Activities: Writing Center Tutor, published in *The Canticle* (student literary journal), Latin minor

EXPERIENCE

NEW YORK CITY COMMISSION ON HUMAN RIGHTS, New York, NY

Law Enforcement Intern: LGBTQ Rights Externship, Jan 2023 - Present

Drafted conciliation agreement in a transgender hostile work environment case against a large multinational corporation. Researched and investigated claimants and respondents in LGBTQ and HIV discrimination cases in NYC.

SELENDY GAY ELSBERG PLLC, New York, NY

Summer Associate, May 2022 - July 2022

Drafted discovery modules for a plaintiff-side shareholder litigation case. Drafted memo on a startup's tortious interference claims under California law. Drafted verified petition for a NYS Article 78 review of a parole hearing. Drafted research memoranda on LGBTQ+ tax law, FOIL requests, NYS civil procedure, and Utah solar energy regulation.

NEW YORK CITY LAW DEPARTMENT, New York, NY

Legal Extern, Appeals, Jan 2022 - April 2022

Drafted a brief for the appeal of an Article 78 proceeding to a NYS Appellate Division Court containing federal FMLA claims, NYC Human Rights Law claims, and procedural issues. Researched and drafted memoranda on employment, constitutional, insurance regulatory, tort and family law. Mooted colleagues for appellate arguments before NYS Appellate Division Courts.

TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND (TLDEF), New York, NY

Summer Legal Intern, May 2021 - July 2021

Researched and drafted legal memoranda on healthcare and insurance law, as well as contract, constitutional and criminal law. Drafted demand letters to healthcare providers. Drafted a regulatory comment on trans healthcare. Conducted intake interviews.

THE OUT FOUNDATION, Provo, UT

Development Coordinator (Volunteer), March 2019 - September 2020

Organized development and sourced grants for an LGBTQ+ alumni association for LDS-affiliated (Mormon) universities.

UNITED STATES ATTORNEY'S OFFICE, DISTRICT OF UTAH, Salt Lake City, UT

Student Trainee: Clerical, September 2019 – April 2020

Provided administrative and IT support to paralegals and attorneys. Managed personnel files. Assisted in grand jury prep.

ADDITIONAL INFORMATION

Advanced German language skills. Volunteer full-time LDS missionary, two years. Former 4-H at-risk-youth mentor, LDS Church youth leader, substitute high school teacher, and captioner for the hard-of-hearing. Outdoors enthusiast.

 Name:
 Christopher I Taylor

 Print Date:
 06/11/2023

 Student ID:
 N13119736

Institution ID: 002785
Page: 1 of 1

School of Law Juris Doctor Major: Law

	New York Univers Beginning of School of La			Sexuality, Gender and the Law Seminar LAW-LW 10529 2.0 Instructor: Travis J Tu) A
	Degrees Awarde	ed		Teaching Assistant LAW-LW 11608 2.0 Instructor: Catherine M Sharkey) CR
Juris Doctor School of Law	•	05/17/20	023	Constitutional Law LAW-LW 11702 4.0) A-
Major: Law	F. II 0000			Instructor: Christine Mae Billy) A
School of Law	Fall 2020			Hilary Meltzer	
Juris Doctor Major: Law				Instructor: Christine Mae Billy Hilary Meltzer) CR
Lawyering (Year) Instructor:	Ashley Binetti Armstrong	LAW-LW 10687	2.5 CR		13.0
Criminal Law	,	LAW-LW 11147	4.0 A-	Cumulative 56.0	56.0
Instructor: Procedure	Randy Hertz	LAW-LW 11650	5.0 B	McKay Scholar-top 25% of students in the class after four semesters	
Instructor:	Geoffrey P Miller			Fall 2022	
Contracts Instructor:	Florencia Marotta	LAW-LW 11672	4.0 A-	School of Law Juris Doctor	
1L Reading Group	. ioronoid marotta	LAW-LW 12339	0.0 CR	Major: Law	
•	llenging God: Moral Readin	g		Family Law LAW-LW 10729 4.0) B
Instructor:	Joseph Weiler	AHRS	EHRS	Instructor: Melissa E Murray	
Current		15.5	15.5	Professional Responsibility and the Regulation LAW-LW 11479 2.0 of Lawyers) A-
Cumulative		15.5	15.5	Instructor: Hakeem Sakou Jeffries	
	Spring 2021			Debo Patrick Adegbile Moot Court Board LAW-LW 11553 1.0	CR
School of Law	Sp 9				CR
Juris Doctor				Instructor: Roderick M Hills	
Major: Law		L AVA/ L VA/ 10000	40.4	Corporate Crime and Financial Misdealing: LAW-LW 12243 2.0 Legal and Policy Analysis Seminar) A
Corporations Instructor:	Jennifer Hall Arlen	LAW-LW 10223	4.0 A	Instructor: Jennifer Hall Arlen	
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Legislation and the Instructor:	Adam M Samaha	LAW-LW 10925	4.0 A		69.0
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Instructor: 1L Reading Group	Catherine M Sharkey	LAW-LW 12339	0.0 CR	Spring 2023 School of Law	
Instructor:	Joseph Weiler			Juris Doctor	
Financial Concepts	for Lawyers	LAW-LW 12722	0.0 CR	Major: Law	
Current		<u>AHRS</u> 14.5	<u>EHRS</u> 14.5	Colloquium On Culture and Law LAW-LW 10650 2.0 Instructor: Joseph Weiler) A
Cumulative		30.0	30.0	LGBTQ Rights Externship LAW-LW 11130 3.0) A
	Fall 2021			Instructor: Hayley Jill Gorenberg LGBTQ Rights Externship Seminar LAW-LW 11483 2.0) A
School of Law	1 411 2021			Instructor: Hayley Jill Gorenberg	, А
Juris Doctor				Moot Court Board LAW-LW 11553 1.0	
Major: Law) B
Survey of Securities Instructor:	s Regulation Stephen J Choi	LAW-LW 10322	4.0 A	Instructor: Katrina M Wyman Urban Environmental Law and Policy Seminar LAW-LW 12603 2.0) A-
Basic Bankruptcy	Stephen a Onoi	LAW-LW 11460	4.0 B+	Instructor: Danielle H Spiegel	
	Arthur Joseph Gonzalez			Katrina M Wyman	TUDO
Orison S. Marden M Evidence	Moot Court Competition	LAW-LW 11554 LAW-LW 11607	1.0 CR 4.0 B+		<u> 14.0</u>
Instructor:	Daniel J Capra	LAVV-LVV 1100/	+.U D+		83.0
		<u>AHRS</u>	EHRS	Staff Editor - Moot Court 2021-2022	
Current		13.0	13.0	Casebook Associate Executive Editor - Moot Court 2022-2023 End of School of Law Record	
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	Spring 2022				
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THE CITY OF NEW YORK LAW DEPARTMENT 100 CHURCH STREET, ROOM 6-146 NEW YORK, NY 10007-2601

CHRISTINE BILLY Senior Counsel Legal Counsel Division

HON. SYLVIA O. HINDS-RADIX Corporation Counsel

April 6, 2023

RE: Christopher Taylor, NYU Law '23

Your Honor:

I am delighted to recommend Christopher Taylor for a judicial clerkship in your chambers. I had the pleasure of teaching Chris at NYU Law School in the New York City Law Department Clinic in the spring of 2022. The course includes a 10-hour/week externship at the New York City Law Department, a 2-hour seminar each week, and a final paper. Chris excelled at all three. His clarity of thinking, hard work, and positive and collaborative attitude distinguished him among his peers. He would be a welcome addition to any judicial chambers.

As a course instructor, I greatly appreciated Chris' constructive participation in the seminar discussions each week. In his comments, he offered an engagement with the substantive materials, as well as the ability to draw connections with relevant subject matter from other coursework. In his comments, Chris showed notable maturity in his ability to engage with contrary viewpoints in a thoughtful way that often enriched and elevated our class discussions.

Chris particularly excelled in his written work. His final project involved an assessment of First Amendment challenges to "conversion therapy" bans, in which he offered a proposed framework for local legislation on this topic in New York City. In the course of writing the paper, Chris sought out and effectively incorporated professor feedback, as well as input from subject matter experts at the NYC Department of Consumer and Worker Protection (DCWP), the City agency that would be responsible for enforcing such a law. The final product was well researched, well written, and demonstrated exceptional legal analysis on the First Amendment on a level that surpassed what I am accustomed to seeing among law students that take this course. The paper also showed distinction in its deep engagement with the topic, and it had valuable practical application. Chris' proposal involved a thoughtfully crafted public participation process to gather input from advocates and community stakeholders, illustrating his understanding of key class themes relating to local democracy. For these reasons, we have shared Chris' paper with subsequent students as a model final paper, and DCWP has asked to review it as a resource for their attorneys.

As part of the course, Chris worked as an extern in the Appeals Division of the New York City Law Department during the spring of 2022. Chris worked directly with nine

Christopher Taylor, NYU Law '23 April 6, 2023 Page 2

attorneys, and they were unanimous in their strong praise of his work. They described him as smart, diligent, and easy to get along with. In particular, they noted that his work product was well-organized and on time, and that he demonstrated initiative and follow-through during the externship. They praised his strong research and writing skills and entrusted him with drafting appellate briefs for the division. They also praised his strong oral advocacy skills when explaining legal issues to attorneys and clients. Based on the high quality of Chris' work, they expressed an interest in having him work in the division in the future.

For all of these reasons, I recommend Chris wholeheartedly for a clerkship. Please feel free to call me if you have any questions.

Sincerely,

/s/

Christine Billy

Senior Counsel, Legal Counsel Division

Adjunct Professor of Clinical Law NYU School of Law <u>christine.billy@nyu.edu</u> 917.270.9703



Jennifer H. Arlen

iennifer.arlen@nyu.edu

Norma Z. Paige Professor of Law Faculty Director, Program on Corporate Compliance and Enforcement 40 Washington Square South, 411D New York, NY 10012 Telephone: (212) 992-8842

May 16, 2023

RE: Christopher Taylor

Dear Judge:

I am writing to recommend Chris Taylor (NYU 2023) for a judicial clerkship in your chambers. I have known Chris since his first year at NYU and am confident he would be an exceptional clerk. He is smart, insightful, hard-working, diligent, and is a pleasure to be around. He would be an asset to your chambers.

I first had the pleasure of teaching Chris when he enrolled in my 1L elective Corporations course. Though this was a smaller elective course with just a handful of students, we still covered four full credits of material that is often quite challenging for first-year law students. Because we were a smaller group and I require all my students to be "on-call" for each class session, Chris and I engaged over the materials nearly every day of the course. Chris consistently impressed me with both his preparedness in reading and responding to the materials, and also with his ability to quickly grasp difficult legal concepts and apply them to new cases. He demonstrated these skills once again on my final exam for the course, where I was happy to award him an A grade.

This past year, Chris was a student in my small-group seminar on Corporate Crime and Financial Misdealing. Chris once again distinguished himself with his eagerness and ability to engage with the material. It is a challenging class. We cover a wide-range of topics including federal corporate criminal enforcement policy, monitors, health care fraud, cybersecurity, data privacy, and crypto currency. We also invited experts in these fields to talk to the students directly about the course topics. Chris was always prepared with excellent and challenging questions for our guest speakers. I particularly remember an exchange Chris had with Steve Solow, the former monitor of Carnival Cruise Lines, about the role of company culture in corporate compliance, and how that culture might operate independently of formal compliance programs. During that class, and nearly every class, I knew I could count on Chris to showcase our students' careful legal analysis and creative problem-solving.

During that seminar, Chris also wrote a paper analyzing a case argued before the Supreme Court in the 2022 term, United States v. Percoco. The question presented in that case is whether former or future public officials can be charged under the honest services mail fraud statute. Chris' paper focused on crafting a theory of liability that captured the defendant's conduct while also leaving room for legitimate 'revolving-door' activities of lobbyists and the like. Chris built his new theory of liability on careful research of caselaw from across jurisdictions, and on novel analysis of the Restatement (Third) of Agency. He conducted independent legal research and took a fresh approach to the issues. He also was one of the most diligent students in turning in drafts throughout the semester, enabling us to engage in two successive rounds of feedback before he turned in his

May 16, 2023 Page 2

final draft. He responded thoughtfully and comprehensively to all suggestions to strengthen his analysis. His final analysis was insightful and creative. His paper earned an A-grade, but more importantly it demonstrated that Chris's ability to engage in legal research and writing. Chris' paper demonstrates exactly the kind of analysis most useful in a judicial clerk.

My colleagues recognized his insight. Professor Catherine Sharkey selected him to serve as a Teaching Assistant for her 1L torts class. Chris both helped many of his classmates better understand a difficult 1L course, but also worked with Professor Sharkey to expand her syllabus, including to incorporate cases on physical disability and the reasonable person standard. In addition, the Office of Student Affairs hired him as a tutor for corporations courses, helping other students understand the concepts he mastered in my course.

Chris has demonstrated his preparedness for service as a judicial clerk outside my classroom as well. Chris worked as an associate executive editor for the Moot Court Board's Casebook, which operates at NYU Law as a journal. The Casebook is a collection of moot court problems published yearly by the school and used across the country by other schools and legal professionals. As part of his service on the Moot Court Board's executive board, Chris worked with other students to edit, organize and direct the publication of the latest Casebook volume. He personally oversaw the editing and publication of several problems, each of which consisted of a bench memo outlining the legal issues underlying a current circuit split, and a 'record' for use by students in competitions and legal writing exercises. Chris was also the principal editor for the two problems argued in the school's internal Orison S. Marden Moot Court Competition, the final round of which was argued in front of three federal judges. For the latest Casebook volume, Chris also authored his own problem and was awarded the Lawrence Green Prize for Best Casebook Problem.

Chris has a deep commitment to public service. He has been active in student organizations and gained practical clinical experience while in law school. In 2022, he was a legal extern for the appeals division of the NYC Law Department. Last year, he was a Law Enforcement Intern for the NYC Commission on Human Rights. Within the law school, Chris also served as a mentor in the school's Law and Government Society, helping new students navigate the difficult landscape of legal education while pursuing careers in public interest and government work.

Overall, Chris has demonstrated during his time at NYU that he is a thoughtful, insightful mind who is committed to using his talents in the public's interest. I hope you will strongly consider him for a position in your chambers.

Sincerely,

Jennifer Arlen Norma Z. Paige Professor of Law Faculty Director, Program on Corporate Compliance and Enforcement New York University School of Law June 12, 2023

The Honorable Juan Sanchez James A. Byrne United States Courthouse 601 Market Street, Room 14613 Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Christopher Taylor for a clerkship in your chambers. I initially came to know Christopher as a student in my 1L Torts class during the Spring 2021 semester (in which he earned an A-). Based on his strong performance, which included regularly making valuable contributions to class discussion, I selected him to be one of my teaching assistants (TAs) during the Spring 2022 semester, and am very glad to have done so.

Christopher, along with his fellow TAs, helped me review and update the Torts class syllabus over the summer of 2021. Christopher was responsible for reading and updating the sections on negligence, medical malpractice, and res ipsa loquitor, and he added tremendous value. He showed creativity and engagement with the material with his proposed revisions, including, for instance, his addition of a case that addressed the intersection of physical disability and the reasonable person status. He also refined and shortened the medical malparctice readings in ways that I felt greatly improved the syllabus, and augmented the readings with key excerpts from the Restatement (Third) on Torts. He also helped supplement the syllabus and class discussion with a memo addressing jury instructions on the issue of necessity. Christopher was also highly regarded by the students in his discussion section, and he took the time to devise creative ways to make each session as helpful to them as possible.

On a personal level, Christopher is a bright, mature, focused young man, and he is a pleasure to work with. His resume reflects uncommon dedication to LGBTQ issues; not only have many of his jobs and internships focused around such issues, but he has devoted his time at the law school to co-chairing the OUTLaw Board, amongst his other activities. Moreover, he has done so while maintaining an impressive GPA, reflecting his ability to manage his time well and to meet all of his obligations.

I believe Christopher would be a valuable asset to your chambers and I hope you will seriously consider him as a candidate.

Sincerely, Catherine M. Sharkey Segal Family Professor of Regulatory Law and Policy



Distant Horizons Counseling, LLC, Petitioner,

-against-

Basil Hullwurd, Director of Steubensia Board of Medical Examiners Respondent.

Memorandum of Law

Prepared by: Christopher Taylor

Please note: This Memorandum was prepared, edited and published as part of my membership on NYU's Moot Court board. It presents a fictional hypothetical case in federal court dealing with First Amendment issues.

QUESTIONS PRESENTED

- (1) Whether strict scrutiny applies to bans on sexual orientation change efforts ("SOCE") and gender identity change efforts ("GICE") under the First Amendment.
- (2) Whether SOCE and GICE bans withstand the respective level of First Amendment judicial scrutiny.

STATEMENT OF FACTS

Sexual orientation change efforts ("SOCE") and gender identity change efforts ("GICE"), both commonly known as "conversion therapy," are practices by medical and mental health professionals designed to reduce or eliminate a person's same-sex attractions, or to bring a person's gender identity in line with their sex assigned at birth. Practitioners use techniques such as talk therapy; aversive conditioning including shock therapy, hypnosis, masturbation or pornographic conditioning; and other psychological (or pseudo-psychological) strategies to reorient subjects.¹ These therapies have been decried by the psychological and medical communities as flawed and dangerous practices, which are also unlikely to be successful.² Consistent with this consensus among the medical community, the State of Steubensia has decided to ban the practice of "conversion therapy" for minors.

After the 2020 legislative session, Section 626 (§ 626) was added to the state's Business and Professions Code, which regulates the licensing of mental health providers by the state. Section 626.1 defines SOCE and GICE, and then provides in § 626.2 that: "[N]o licensed mental health worker, except clergy, shall engage in sexual orientation or gender identity change efforts with patients under the age of 18 [L]icensed mental health workers who engage in such attempts will be subject to professional discipline." Ex. A, at 14. Section 626.3 qualifies this prohibition, such that "nothing in this statute should be understood to endorse a particular viewpoint about the mutability of gender or sexual orientation; nor are therapists prohibited from discussing their views about that mutability with patients outside therapy." *Id*.

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¹ See, e.g., Am. Med. Ass'n, Issue Brief: LGBTQ change efforts (so-called "conversion therapy") (2019) [hereinafter AMA Issue Brief], https://www.ama-assn.org/system/files/2019-12/conversion-therapy-issue-brief.pdf (last visited Nov. 7, 2022) (detailing the various techniques for SOCE and GICE and their inefficacy).

² See, e.g., AMA Issue Brief, supra note 1 (detailing the inefficacy of SOCE and GICE and resulting social and psychological harm); Am. Psych. Ass'n, Report of the APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation app. A, at 121, https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf (last visited Nov. 7, 2022) (detailing the same).

In the official legislative history accompanying the 2020 Steubensia legislative session, several findings and reports were included. Among them:

- Reports from Steubensia State Medical and Psychiatric Associations summarizing the research on SOCE and GICE, and stating official opinions against it. Ex. B, at 15–16.
- A summary report from a longitudinal case study of 80 LGB men and women, conducted at Steubensia State University, highlighting the detrimental effects of SOCE. Ex. C, at 17–18.
- A list of other states that have successfully implemented SOCE and GICE bans. Ex. D, at 19.

Petitioner, Distant Horizons Counseling, LLC ("Distant Horizons") is a self-proclaimed treatment center for those who wish to "eliminate same-sex attraction," or to "alleviate gender dysphoria without undergoing a gender transition." Distant Horizons believes that the 2020 SOCE and GICE bans violate their constitutional rights under the First Amendment.

Located a few miles outside Steubensia City, Steubensia, Distant Horizons holds a summer camp for teens seeking treatment, and they also have a year-round treatment program for adults. Three full-time counselors are employed at the camp, two of whom are licensed clinical social workers in the state of Steubensia, and a third who is a licensed psychologist with a Ph.D. from Steubensia State University. These counselors treat both children and adults. They employ talk and group therapy to encourage heterosexual attraction, to discourage same-sex attraction, and to discourage those with gender dysphoria from transitioning. Distant Horizons is not affiliated with a particular religious group, but all three counselors self-identify as Christian.

PROCEDURAL POSTURE

After the 2020 legislative session, Distant Horizons filed a lawsuit in federal court in the District of Steubensia against Basil Hullwurd, the Director of the Board of Medical Examiners of the State of Steubensia. Distant Horizons claimed that the statute, both facially and as applied to therapists of minor patients, violated the First Amendment right to free speech. Distant Horizons sought a preliminary injunction to enjoin enforcement of the statute against their therapists for the treatment of minor patients. They have paused their summer camp for children until they receive the requested injunction, but they continue to offer treatment for adults.

The district court found for Distant Horizons and granted the preliminary injunction, holding that strict scrutiny should be applied to the SOCE and GICE ban, and that the statute would likely not withstand strict scrutiny. The Government filed

an interlocutory appeal to the Court of Appeals for the Fourteenth Circuit, pursuant to 28 U.S.C.A. § 1291(a)(1).

The circuit court reversed the lower court's decision, finding the district court abused its discretion by granting the preliminary injunction because the circuit court determined that talk therapy was speech "incidental to regulated conduct," and should thus be evaluated using intermediate scrutiny. Under intermediate scrutiny, that court surmised that the statute would almost certainly be constitutional, and that Distant Horizons had no likelihood of success on the merits—warranting no preliminary injunction. *Distant Horizons, LLC v. Hullwurd*, 123 R.S.S. 456 (D. Steubensia 2021); see also Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 19–20 (2008) (explaining the standard for a preliminary injunction). Distant Horizons petitioned the Supreme Court for a writ of certiorari. Cert was granted.

SUMMARY

SOCE and GICE are controversial practices, and Steubensia is not the first government to ban them. Previously, SOCE bans had been upheld by the Third and Ninth Circuits. See King v. Governor of N.J., 767 F.3d 216, 246 (3d Cir. 2014); Pickup v. Brown, 740 F.3d 1208, 1236 (9th Cir. 2014). Both bans were challenged on free speech grounds, and both were upheld under variations of the "professional speech" exemption to First Amendment strict scrutiny analysis. King, 767 F.3d at 236; see also Pickup, 740 F.3d at 1229.

However, the Supreme Court called into question the "professional speech" exemption in an abortion regulation case, Nat'l Inst. of Fam. and Life Advoc. v. Becerra (NIFLA), 138 S. Ct. 2361, 2375 (2018) applying strict scrutiny to content-based speech because none of the circuits had "identified a persuasive reason for treating professional speech as a unique category" but not "foreclos[ing] the possibility that some such reason exists."). The next circuit to take up the specific question of SOCE and GICE was the Eleventh Circuit, which held in Otto v. City of Boca Raton that a prohibition on SOCE and GICE violated free speech principles under strict scrutiny, consistent with NIFLA's holding. See 981 F.3d 854, 868 (11th Cir. 2020), reh'g en banc denied, 41 F.4th 1271 (11th Cir. 2022). Thus, a circuit split on the SOCE and GICE issue has been created, with the majority of courts' principal reasoning for applying intermediate scrutiny now abrogated by the Supreme Court. This leaves two questions undecided: (1) which level of judicial scrutiny should apply to SOCE and GICE bans, and (2) whether SOCE and GICE bans are viable under the correct level of judicial scrutiny.

In this case, the parties will first need to present their arguments as to which level of judicial scrutiny should be applied. Petitioner, Distant Horizons, will argue (1) for the application of strict scrutiny, following *Otto*'s holding that speech is speech, even when under the guise of talk therapy, and (2) for additional protections beyond

even strict scrutiny under the First Amendment doctrine of viewpoint-based restrictions. Meanwhile, the Government will urge the Court to apply intermediate scrutiny, construing the statute as simply a restriction on speech incidental to the regulation of professional conduct, consistent with *NIFLA*'s holding.

Once the parties have made their case for an appropriate standard of review, they will need to present a case as to why the statute should either be upheld or overturned under that standard. Strict scrutiny requires a statute that is narrowly tailored to address a compelling government interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). Intermediate scrutiny requires that a statute further an interest that is both within the government's power and unrelated to free expression, and that there is not a less restrictive alternative. *United States v. O'Brien*, 391 U.S. 367, 376—77 (1968).

To meet either of these standards, Distant Horizons will point to (1) the lack of empirical research on SOCE and GICE, as well as (2) the potential under inclusiveness of Steubensia's statute, and (3) the severity of government imposition on the patient-therapist relationship. The Government will point to (1) the strong disapproval of SOCE and GICE within the medical and psychological communities, (2) recent research and testimony suggesting that these practices are harmful, and (3) case law supporting the government's interest in protecting children's psychological welfare.

DISCUSSION

I. Parties Will Argue Over Which Standard of Constitutional Review a Court Should Apply to SOCE and GICE Bans.

Petitioner, Distant Horizons, will argue for the application of strict scrutiny because § 626 is at least a content-based restriction—if not a viewpoint-based restriction—on therapists' free speech. Respondent, the Government of Steubensia, will argue that strict scrutiny is inappropriate here because (1) these are not content-or viewpoint- based restrictions, (2) the Court should exempt professional speech from strict scrutiny review, and (3) the statute is a regulation of medical conduct with an incidental effect on speech.

A. Parties Will Debate Whether the Restriction Is a Content- or Viewpoint- Based Restriction of Speech.

Courts presume that government-imposed content-based restrictions on speech are unconstitutional, as opposed to content-neutral restrictions. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The constitutionality of these content-based restrictions is evaluated under strict scrutiny, which requires that the government have a compelling interest in restricting the content of speech, and that the law be narrowly tailored to that interest. *Id.* at 171; *see also City of Austin v. Reagan Nat'l*

Advert. of Austin, LLC, 142 S. Ct. 1464, 1471 (defining both content-based and content-neutral restrictions and holding that strict scrutiny applies to the former).

According to the Court's precedent, even more egregious than content-based restrictions are viewpoint-based restrictions, a form of content-based restriction that prohibits particular political or ideological positions. See Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). These restrictions are almost per se unconstitutional and are subject to the highest level of scrutiny in the First Amendment context. See Otto v. City of Boca Raton, 981 F.3d 854, 864 (11th Cir. 2020), reh'g en banc denied, 41 F.4th 1271 (11th Cir. 2022) (quoting Members of the City Council vs. Taxpayers for Vincent, 466 U.S.789, 804 (1984) ("The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.")) (suggesting that there is an argument based in Supreme Court precedent for the per se unconstitutionality of viewpoint discrimination). Even if the regulated speech belongs to a category which normally receives no First Amendment protection, a viewpoint-based restriction on that speech will likely be found unconstitutional. See R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (holding that the prohibition of specifically racist obscene speech, as opposed to obscene speech generally, was viewpoint-based discrimination and presumptively unconstitutional).

In this case, the statute bans any attempt to change sexual orientation or gender identity, including by strictly engaging in talk therapy. Such a restriction, Respondent will argue, may very likely be content-based, as it prohibits the discussion of certain topics within the therapeutic context. See, e.g., King v. Governor of New Jersey, 767 F.3d 216, 236 (3d Cir. 2014) (holding, though a SOCE ban was content-based, that for other reasons strict scrutiny should not be applied); see also Wollschlaeger v. Governor, 848 F.3d 1293, 1307 (11th Cir. 2017) (finding a statute restricting speech on gun ownership in patient conversations was content-based). Petitioner will still likely try to argue that this is not content-based, citing Pickup v. Brown for the proposition that regulation of conduct is not a content-based speech restriction. 740 F.3d 1208, 1228 (9th Cir. 2014).

If this Court finds this is a content-based restriction, it should also consider whether viewpoints are being restricted. When a restriction is also considered a viewpoint-based restriction, it is unlikely that it will survive any form of scrutiny and may even be unconstitutional per se. See Rosenberger, 515 U.S. at 829 (finding viewpoint discrimination is a "blatant" violation of constitutional rights); Taxpayers for Vincent, 466 U.S. at 804 (prohibiting the government from favoring certain viewpoints in speech restrictions); but see Morse v. Frederick, 551 U.S. 393, 410 (2007) (authorizing, in the school speech context, a restriction construable as viewpoint-based discrimination to prevent the promotion of drugs in schools). Thus, Petitioner

will argue that the statute restricts both the content of therapists' speech and their particular viewpoint, while Respondent will urge the court not to find viewpoint-based restriction in this statute.

1. Respondent will argue that the Court should not find viewpoint-based discrimination or content-based discrimination here.

Respondent, consistent with the court's reasoning in *King*, will argue that this is not viewpoint-based discrimination because it does not prevent therapists from speaking about the possible mutability of sexual orientation, it only prevents them from engaging in efforts with their own patients to change sexual orientation. *See* 767 F.3d at 237. Public advocacy for SOCE, as well as private conversations outside of the patient-therapist relationship, are not banned by this statute, as was the case in *King*. *Id*.

Responded will argue that this statute is more narrow than other SOCE bans. This statute, unlike those previously seen in SOCE bans, specifically neither endorses nor expresses views on sexual orientation or gender mutability. The statute also expressly allows the discussion of those views outside the context of therapy and treatment. This may give weight to Respondent's argument against viewpoint-based discrimination, since it highlights that the practice of SOCE itself is banned, not expressing viewpoints on SOCE. *Cf. Pickup* 740 F.3d at 1229 (upholding a bill that "bans a form of treatment for minors; [but] does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients.").

Respondent may also attempt to argue against content-based discrimination, but this is a more difficult argument, as even courts friendly to SOCE bans have struggled to view them as anything but a restriction of the content of therapists' speech. See King, 767 F.3d at 236 (holding that a SOCE ban is at least content-based discrimination). Respondent may try to argue that these are merely restrictions on a particular kind of therapeutic practice and not on speech at all, as therapists are explicitly allowed under Steubensia's statute to discuss sexual orientation change efforts with patients outside of therapy. § 626.3; Ex. A; see also Pickup, 740 F.3d at 1229 (applying rational basis review since a SOCE ban was found to be a proscription only on conduct).

2. Petitioner will argue that the statute impermissibly restricts both the content of therapists' speech and specific viewpoints.

Petitioner will ask the court to embrace the *Otto* court's view that prohibitions of sexual orientation and gender identity change efforts likely restrict certain viewpoints, and certainly restrict the content of speech. *Otto*, 981 F.3d at 864. Petitioner may also argue that, because of the exemption in the statute for counseling a person through a gender transition, the statute implicitly endorses the viewpoint that gender is mutable but sexual orientation is not. *Id.* (arguing the same based on a similar statutory exemption). This is likely undercut by the specific language of Steubensia's statute, which expressly declines to endorse or prohibit any viewpoints on gender mutability. However, the statute might still be read as codifying the viewpoint in practice. *See id.*

As for the argument that this statute does not ban speech about SOCE, only SOCE itself, Petitioner may refer to *Otto*'s proposition that therapist's ideas must be able to find expression in their practice in order to have any use. *Id.* at 863 ("[W]hat good would it do for a therapist whose client sought SOCE therapy to tell the client that she thought the therapy could be helpful, but could not offer it?"). Additionally, if therapists can only advocate for their viewpoint *outside* of the context most relevant to them, this in essence neuters their First Amendment protections. *Id.* ("[T]he constitutional problem posed by speech bans like this one is not mitigated when closely related forms of expression are considered acceptable.").

B. Petitioner Will Argue That SOCE and GICE Bans Should Be Evaluated Under Strict Scrutiny; Respondent Will Argue That These Bans Should Be Exempted from Strict Scrutiny.

Ordinarily, content—and especially viewpoint—based restrictions on free speech are evaluated under strict scrutiny. *Cf. Reed.*, 576 U.S. at 163. This is a demanding standard that will be unfriendly to Respondent, who will likely put forth arguments that the Court should exempt these content-based restrictions from the normally applicable standard. *Id.* (holding that content-based restrictions are presumptively unconstitutional). However, the exemption for "professional speech" used in previous SOCE cases has now been foreclosed by the Supreme Court, which will force Respondent to turn elsewhere. *Nat'l Inst. of Fam. and Life Advoc. v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2375 (2018) . Thus, Respondent and Petitioner will likely argue about whether the statute can be construed as regulating only speech incidental to conduct. *See Pickup*, 740 F.3d at 1229 (holding that SOCE bans regulate only conduct and are not subject to strict scrutiny).

1. The "professional speech" exemption from strict scrutiny likely does not prevail after *National Institute of Family and Life Advocates v. Becerra*.

Previous statutes outlawing SOCE have been exempted, as "professional speech," from the strict scrutiny review normally applied to content-based regulations. *See King*, 767 F.3d at 232; *Pickup*, 740 F.3d at 1228. This was consistent

with other circuit court decisions at that time, which had broadly exempted, from First Amendment strict scrutiny, any speech by state-regulated professionals within their professional relationships with patients or clients. See, e.g., Wollschlaeger v. Governor of Fla., 760 F.3d 1195, 1219 (11th Cir. 2014), opinion vacated and superseded on reh'g en banc sub nom. Wollschlaeger v. Governor, Fla., 848 F.3d 1293 (11th Cir. 2017) (applying professional speech exemptions to doctors); Moore-King v. County of Chesterfield, 708 F.3d 560, 569 (4th Cir. 2013) (applying professional speech exemptions to fortunetellers). In creating this exemption to First Amendment protections, circuit courts drew on the logic of the Supreme Court in decisions which upheld limitations on commercial speech and professional speech incidental to conduct. See, e.g., Pickup, 740 F.3d at 1228 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844 (1992)³).

However, this entire line of cases, and more specifically the "professional speech" exemption, were most likely abrogated in 2018 by NIFLA. 138 S. Ct. at 2375. In that case, which concerned mandated abortion disclosures in California pregnancy health clinics, the Supreme Court held that circuit courts had identified no "persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles." Id. Given that the lines of reasoning in both King and Pickup were explicitly denounced by the Supreme Court, Petitioner has a strong argument that the Court should not now apply the professional speech exemption to SOCE/GICE. Cf. NIFLA, 138 S. Ct. at 2371–72 (highlighting a lack of precedent for recognizing "professional speech" as a special category). In fact, consistent with that de facto overruling, the Eleventh Circuit in Otto found that the professional speech between therapists engaging in SOCE was not exempt from First Amendment protections. 981 F.3d at 861 (applying strict scrutiny to a SOCE ban in light of the holding in NIFLA).

However, the Court in NIFLA did not "foreclose the possibility that some such reason [for a professional speech exemption] exists." 138 S. Ct. at 2375. This may give Respondent some room to argue for a limited reinstatement of a professional exemption consistent with NIFLA's holding. See id. at 2382 (Breyer, J., dissenting). Respondent could rely on policy arguments that emphasize states' interest in ensuring access to reliably safe and evidence-based psychological treatment, even in the face of a doctor's constitutional rights or personal beliefs. See id. (Breyer, J., dissenting) ("Medical professionals do not, generally speaking, have a right to use the Constitution as a weapon"). After the NIFLA decision, the original plaintiffs in King made a motion to recall the mandate of the Third Circuit; this motion was denied on procedural grounds, and the Supreme Court did not grant certiorari. King v. Governor of N.J., No. 13-4429, 2018 WL 11303632, at *1 (3d Cir. Oct. 11, 2018), cert.

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³ Casey, 505 U.S. 833, addressed both the constitutional right to abortion under the right to privacy and compelled speech First Amendment concerns. The Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), which eliminated the constitutional right to abortion, left the First Amendment precedent in *Casey* untouched.

denied sub nom. King v. Murphy, 139 S. Ct. 1567 (2019). So, Respondent's argument that NIFLA does not expressly overrule King and Pickup has at least some weight, given that the Court has already passed on one opportunity to recall those cases.

2. Respondent will argue that this statute regulates speech incidental to conduct and thus should be subject to intermediate scrutiny under the *O'Brien* standard.

Since the professional speech exemption is at least partially foreclosed, Respondent will need to look elsewhere to prevent this statute from falling under strict scrutiny. Another possibility for avoiding strict scrutiny might be to view the restricted speech under the *O'Brien* standard, where the Supreme Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Incidental free speech restrictions evaluated under the *O'Brien* standard are subject to an intermediate level of scrutiny, a less demanding test that only requires "(1) the interest served is within the power of the government; (2) the regulation furthers that interest; (3) the interest served is unrelated to free expression; and (4) there is no less restrictive alternative." *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 996 (11th Cir. 1998) (citing *O'Brien*, 391 U.S. at 377).

However, the line must be carefully drawn when a statute proscribing certain conduct nevertheless creates clear content-based restrictions on speech; these cases are still subject to strict scrutiny. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010); *see also Texas v. Johnson*, 491 U.S. 397, 412 (1989) (determining criminal prosecution of a protestor burning an American flag constitutes content restriction); *Pickup*, 740 F.3d at 1216 (O'Scannlain, J., dissenting) ("In other words, the government's ipse dixit cannot transform 'speech' into 'conduct' that it may more freely regulate."). If regulations on conduct are still found to be essentially content-based restrictions, they cannot fall under *O'Brien*. *Holder*, 561 U.S. at 28.

The most famous application of the *O'Brien* distinction to the medical context is perhaps *Planned Parenthood v. Casey*, which, in part, concerned informed consent requirements for abortion. *See Casey*, 505 U.S. at 844 (analyzing the First Amendment applied to compelled informed consent disclosures for abortions). The Court in that case held that state governments may require informed consent disclosures for medical procedures, even for controversial procedures like abortion. *Id.* at 882. In *NIFLA*, the Court refined this holding, stating that the informed consent or other mandated speech must be "tied to a procedure," and that speech restrictions which were applied to a patient-doctor relationship generally were not merely incidental to the conduct regulated. 138 S. Ct. at 2373. In other words, statutes limiting patient-provider speech across all procedures are problematic

because they are designed to restrict discussion of a certain content, as opposed to regulating the practice of a specific procedure. *Id.*; *cf. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (invalidating a law banning certain communications between doctors and pharmaceutical detailers because it "does not simply have an effect on speech, but is directed at certain content . . ."); *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (finding a ban on discussions about marijuana treatment between physicians and patients unconstitutional).

Respondent will urge the court to apply the O'Brien and Casey standards. finding that these are restrictions on speech "tied to a procedure," namely, the procedures of SOCE and GICE. NIFLA, 138 S. Ct. at 2373. Relying on logic used by the Pickup court, Respondent will assert that "most, if not all, ... mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment." Pickup, 740 F.3d at 1229 (applying rational basis review since a SOCE ban was found to be a proscription only on conduct). Furthermore, the first amendment is not necessarily implicated when an illegal practice is carried out partially using words. See Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was . . . carried out by means of language "). Here, the treatment being banned is the attempt to use talk therapy (or any therapy) to change an individual's gender or sexual orientation. Talking about SOCE and GICE isn't banned. See Pickup, 740 F.3d at 1229. Rather, the use of talking as a tool to change these characteristics is banned. See id. Again, it will help Respondent's case that the statute specifically allows for the discussion of SOCE and GICE outside of the context of treatment—it is only the treatment that is forbidden by the statute, not any speech describing or advocating for the treatment. In this way, the statute more closely adheres to NIFLA's treatment-specific requirement. See NIFLA, 138 S. Ct. at 2373.

3. Petitioner will argue that the *Holder* standard should apply, and that statutes regulating therapist conduct may necessarily impede free speech.

Petitioner will urge the Court to apply the *Holder* standard that content-based restrictions on speech, even if related to some conduct, are nevertheless subject to strict scrutiny. *Holder*, 561 U.S. at 28. They may cite to *Conant v. Walters*, which held that restrictions on conversations between doctors and patients about marijuana were unconstitutional. *Conant*, 309 F.3d at 639. The circuit court in *Conant* applied strict scrutiny instead of intermediate scrutiny and found that an attempt to "punish physicians on the basis of the content of doctor-patient communications" was unconstitutional. *Id.* at 637. Extending *Conant*'s proposition that doctor-patient communications are not outside of the First Amendment's protections, *NIFLA* suggested that doctors may have disagreements with each other and the government about treatment, and should be able to discuss these disagreements with their

patients. See 138 S. Ct. at 2375 ("Doctors and nurses might disagree about . . . the benefits of medical marijuana").

Petitioner may also point out that even the *King* court, in upholding a SOCE ban, asserted that talk therapy must be analyzed as speech under the First Amendment and *Holder*. *King*, 767 F.3d at 224–25 (disagreeing with the *Pickup* court's application of a conduct-based *O'Brien* approach). The Eleventh Circuit also took this approach in *Otto*, 981 F.3d at 865 ("If SOCE is conduct, the same could be said of teaching or protesting—both are activities, after all. Debating? Also an activity."). As for the portion of the statute expressly allowing discussion of SOCE outside the therapeutic context, Petitioner will once again apply the reasoning of the *Otto* court—if therapists cannot speak in the context that matters most to them, there can be no more significant restriction on their First Amendment rights. *See Otto*, 981 F.3d at 863. This will also be supported by the Supreme Court's assertion in *NIFLA* that patient-provider conversations are part of the marketplace of ideas that the First Amendment is designed to protect. *NIFLA*, 138 S. Ct. at 2375.

II. Parties Will Argue Whether the Statute Survives Under the Respective Level of Judicial Scrutiny.

Respondent will argue that the statute survives under intermediate scrutiny. But, even if strict scrutiny applies, it should also survive because the State of Steubensia has a strong interest in protecting the welfare of children, as supported by rigorous legislative findings and consensus within the state's medical and psychological communities. See Ex. B, C. Petitioner will argue that, under intermediate scrutiny, the Government has not clearly connected the statute to its stated purpose. Similarly, Petitioner will argue that, under strict scrutiny, the Government has not established that the statute actually protects the psychological welfare of children.

A. Intermediate Scrutiny

To satisfy First Amendment intermediate scrutiny under the *O'Brien* standard regulating "speech incidental to conduct," a challenged statute must further an interest within the government's power, that such interest is unrelated to free expression, and that there is not a less restrictive alternative. *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968).

1. Under intermediate scrutiny, Respondent will point to the reasonable inferences the legislature drew from its findings.

If Respondent is able to successfully make the argument for intermediate scrutiny (most likely by using the *O'Brien* "speech incidental to regulated conduct" standard outlined above), then the statute will be constitutional under the First

Amendment if, "(1) the interest served is within the power of the government; (2) the regulation furthers that interest; (3) the interest served is unrelated to free expression; and (4) there is no less restrictive alternative." Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993, 996 (citing O'Brien, 391 U.S. at 377). This is a less demanding standard, and it is much more likely that Respondent would win, as those defending SOCE bans under intermediate scrutiny or lesser standards have done so in the past. See King v. Governor of N.J., 767 F.3d 216, 234 (3d Cir. 2014) (applying intermediate scrutiny to professional speech due to its similarities with commercial speech); see also Pickup v. Brown, 740 F.3d 1208, 1229 (9th Cir. 2014) (applying rational basis review to a SOCE ban because it was seen as purely regulating conduct). A reviewing court need not second guess lawmakers; it must only determine that the legislature made "reasonable inferences" from "substantial evidence." Turner Broad Sys., Inc. v. FCC (Turner II), 520 U.S. 180, 195 (1997).

Respondent will argue that the interests served are the protection of LGBTQ+people's mental and social well-being, and Steubensian citizens generally from harmful or fraudulent professional practices. See Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975) (highlighting the state interest in regulating professional practice). The regulation furthers these interests, at least to some extent—it would prevent professional practices which the legislature has at least some evidence to believe are both unfounded and dangerous to LGBTQ+ people. In support of this belief, the legislature has gathered reports from within the State of Steubensia, the support and research of large professional medical organizations, and the experience of other governments. See Sammy's, 140 F.3d at 997 ("experience of other cities . . . is sufficient."). Furthermore, by completely banning the practice from which the reported harms stem, this regulation would "alleviate [those] harms in a direct and material way." Turner Broad Sys., Inc. v. FCC (Turner I), 512 U.S. 622, 664 (1994).

Respondent will also argue that the state's interest is not simply to restrict speech about the mutability of sexual orientation and gender, but instead to prevent the psychological harms that SOCE and GICE cause. Cf. Sammy's, 140 F.3d at 997 (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 570 (1991)) (discussing a statute where the interest was found not to prevent the expressive conduct of erotic dancing, but the "evil of public nudity"). Finally, by allowing for broad discussion outside the therapeutic context, and a clergy exemption, the state has demonstrated care in ensuring that this is not more extensive than necessary. See Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999) (not requiring the government to "employ the least restrictive means conceivable," but requiring demonstration of some narrow tailoring).

2. Petitioner will attack the connection between the regulation and its stated purpose to show that it cannot survive intermediate scrutiny.

Under intermediate scrutiny, Petitioner will find it more difficult to make their case; the government interest in protecting children is clearly established and it is unclear that SOCE/GICE can be prevented by anything other than an outright ban. Petitioner may argue however that the connection between the regulation and the purported interest is tenuous and unfounded. See Pitt News v. Pappert, 379 F.3d 96, 107 (3d Cir. 2004) (quoting Edenfield v. Fane, 507 U.S. 761, 770 (1993)) (requiring more than "mere speculation or conjecture"). To succeed with this claim, they would have to show that the legislature did not draw a reasonable inference from professional society's reports, which seems farfetched as both these organizations recommended bans on SOCE and GICE after examining a wide breadth of psychological data. See King, 767 F.3d at 239 (finding that a legislature does not need to wait for conclusive evidence to protect citizens from serious threats).

Petitioner may find more success in arguing that the connection between the regulation and purported interest fails for under-inclusivity. Since many patients and providers will be granted clergy exemptions, it is unclear how this law will operate except to punish secular providers for their speech. *Cf. Nat'l Inst. of Fam. and Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (finding that broad exemptions for certain clinics may indicate "a disconnect between [a statute's] stated purpose and its actual scope").

B. Strict Scrutiny

Under the Court's test for strict scrutiny, Respondent will need to show that the statute is narrowly tailored to a compelling government interest, while Petitioner need merely show that either the government's interests are not compelling, or the statute is inadequately tailored to meet the stated interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015).

1. Under strict scrutiny, Respondent will point to the state's serious compelling interest and its rigorous findings

Under the more demanding standards for content- and viewpoint- based restrictions, both Petitioner and Respondent would make similar arguments, but the Government would be held to a higher standard. See supra at 5–6 (describing strict scrutiny and per se unconstitutionality). At a minimum, Respondent would need to prove that their interest was a "compelling one," and that the statute was "narrowly tailored" to that interest. Reed, 576 U.S. at 171 (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011)). If this is a viewpoint restriction, there may almost be no argument at all for constitutionality. See Rosenberger, 515 U.S. at 829; but see Morse, 551 U.S. at 410 (allowing viewpoint restrictions in school speech context to protect children from serious harm).

To show a compelling interest, Respondent will point again to the seriousness of complications arising from SOCE and GICE, as well as the reports and data

supporting bans on these practices. The psychological welfare of children has been accepted as a compelling state interest, and Petitioner would probably not contest that. New York v. Ferber, 458 U.S. 747, 756–7 (1982); see also Otto, 981 F.3d at 868 (not contesting the interest in protecting children, though noting this does not include protecting children from all possible ideas).

Thus, the strict scrutiny case would depend on whether Respondent can show that the statute is narrowly tailored to the interest of protecting LGBTQ+ children's welfare. To show narrow tailoring, Respondent would first need to show that the ban actually protects the psychological welfare of children. They would do this by pointing to empirical evidence cited by the legislature, as well as the experience of other governments and official testimony. To show that the tailoring was sufficiently narrowed, they could point again to allowances for broad discussion of SOCE and GICE outside of the therapeutic context, as well as the clergy exemption.

2. Petitioner will ask the Court to follow *Otto* in arguing that there is not enough data to support a SOCE or GICE ban under strict scrutiny.

Petitioner has the easier argument if the Court applies strict scrutiny, particularly if it is strict scrutiny applied to a viewpoint-based restriction. See Rosenberger, 515 U.S. at 829. Petitioner will argue that there is simply not enough data to conclusively show that banning SOCE and GICE protects children's social and psychological welfare, relying primarily on the reasoning of the Otto court as applied to talk-therapy SOCE. See Otto, 981 F.3d at 869. The APA report concedes a "complete lack' of rigorous recent research[,]" which could support the conclusion that governments do not have enough information about the efficacy of SOCE therapies to ban them. Id. (citing AMA Issue Brief, supra note 1).

Petitioner may also make a policy argument against deference to the APA and AMA, cautioning courts against giving absolute deference to the opinions of professional organizations. They will likely cite to the *NIFLA* opinion's emphasis on preserving the marketplace of ideas, even within the doctor-patient context. 138 S. Ct. at 2375. They may borrow the *Otto* court's reasoning that the APA had previously classified homosexuality as a disorder, undermining the legitimacy of professional consensus. *Otto*, 981 F.3d at 869–70.

CONCLUSION

This case presents a novel question: given the Supreme Court's recent hostility to "professional speech" exemptions in *NIFLA*, is it at all possible to design a SOCE or GICE ban that can withstand judicial scrutiny? Steubensia's law provides generous exemptions and attempts to carefully skirt the issue of free expression, but it may be impossible to prohibit certain "talk therapies" without implicating the protections of the First Amendment. Respondent can succeed by highlighting the extreme dangers of SOCE and GICE, emphasizing Steubensia's additional

protections for opposing viewpoints, and relying on the nature of therapy as "conduct" to lessen First Amendment protections. Petitioner can succeed by asserting that talk therapy is nothing other than speech, and by showing that legislatures need more information about SOCE and GICE before instituting broad prohibitions on free expression in the patient-therapist relationship.

Applicant Details

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Middle Initial J.
Last Name Terry

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Applicant Education

BA/BS From **Old Dominion University**

Date of BA/BS May 2019

JD/LLB From The University of Memphis--Cecil C.

Humphreys School of Law

http://www.memphis.edu/law/index.php

Date of JD/LLB May 15, 2024

Class Rank 25% Law Review/Journal Yes

Journal(s) University of Memphis Law Review

Moot Court

Experience No

Bar Admission

Prior Judicial Experience

Judicial Internships/
Externships
Post-graduate Judicial
Law Clerk

Yes

No

Specialized Work Experience

Recommenders

Gipson, Ronnie rrgipson@memphis.edu Donald, Bernice Amy_Robinson@ca6.uscourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Tarik J. Terry 122 Gayoso Ave. Apt. #710 Memphis, TN 38103

June 15, 2023

The Honorable Juan R. Sánchez 14613 United States Courthouse 601 Market Street Philadelphia, PA 19106

Dear Judge Sánchez:

I am writing to apply for the 2024-25 clerkship with your chambers. I am a rising third-year student at the University of Memphis School of Law. I am interested in a one-year term clerkship beginning in September.

As a rising second-year law student, I externed in the chambers of the Honorable Judge Bernice B. Donald, who recently retired from the Sixth Circuit. This experience proved to be immensely enlightening, particularly as a first-generation law student who had not fully grasped the immeasurable value derived from a clerkship. Throughout the externship, I delved into diverse and intricate legal issues on a weekly basis, including tax and criminal law. I am enthused by the opportunity to clerk in your chambers because I believe that learning directly from your expertise would greatly benefit my future career as a civil litigator. With my combined experiences as a research assistant, law review editor, and judicial externship, I believe I possess the skills and dedication necessary to excel as a judicial clerk in your chambers.

I am confident that I will be an excellent asset to your chambers because of my ability to write and research quickly and accurately. My application includes my resume, cover letter, undergraduate and law school transcripts, and forthcoming letters of recommendation from Professor Ronnie G. Gipson and the Honorable Judge Bernice B. Donald. I would greatly appreciate the opportunity to interview with you, and look forward to hearing from you soon. Thank you for your consideration.

Sincerely,

Tarik J. Terry

Tarik J. Terry

(571) 236-1517 tarikjterry@gmail.com

EDUCATION

University of Memphis, Cecil C. Humphreys School of Law – J.D. Candidate, May 2024

August 2021 – present

- Rank: 27 | 3.34 GPA | 23%
- Volume 54 of The University of Memphis Law Review, Media Editor
- Research Assistant, Professor Daniel Kiel
- Research Assistant, Professor Ronnie R. Gipson Jr.
- Honor Council: 2023-24 Associate Chief Justice | 2022-23 Student Justice
- 109 pro-bono hours: VITA Tax Clinic | 2022 Alternative Spring Break, Fair Housing Tester

OLD DOMINION UNIVERSITY - B.S. Political Science

August 2015 - May 2019

- Student Government Association: 2018-19 Speaker of the Senate | 2018-19 State Council for Higher Education, Representative
- Pi Kappa Alpha Fraternity: 2018-19 International Board Member | 2017-18 Chapter President | 2016-17 External Vice President

EXPERIENCE

McAngus, Goudelock, & Courie

Memphis, TN

Incoming Summer Associate

July 2023 - August 2023

Manley Burke, LPA Cincinnati, OH

Summer Associate

May 2023 – June 2023

- Drafting documents including complaint, motion for default judgment, opinion letter, powers of attorney, and last will and testament.
- Researching and preparing memoranda in various areas such as nonprofit organization tax, zoning, evictions, and statutory interpretation.
- Researched and prepared a brief article regarding state legislation on hazing; publishing forthcoming in the Fraternal Law Newsletter.

Wolff Ardis, P.C. Memphis, TN

Law Clerk

July 2022 – April 2023

- Researched Tennessee tort law specializing in product liability in addition to, property torts, legal ethics, contract law, and ERISA.
- Drafted demand letters, research memoranda, and summaries of depositions, medical timelines, and defendant interrogatories.
- Attended potential client intake meetings to note factual claims and participating in evidence intake including photographing vehicles.

Chambers of the Honorable Judge Bernice B. Donald

Memphis, TN

United States Sixth Circuit Court of Appeals

Judicial Extern

May 2022 - July 2022

- Performed weekly research on a variety of case law to provide Judge Donald with recommendations on whether to hold oral arguments.
- Collaborated with a team on long-term tax law research to draft case summary and questions for the Judge to ask during oral argument.
- Researched Fourth Amendment issues and drafted dissent that was substantially adopted by the lead clerk and Judge Donald.

University of Massachusetts Medical School

Remote

Government Relations Intern:

Jun. 2021 – Aug. 2021

- Researched best practices for increasing engagement in employee charitable giving and volunteerism for the upcoming giving season.
- Assisted with post-event data entry into new Collaboratory Software by crafting user guides and templates for software's best practices.
 Provided progress reports during daily staff support calls, state legislature committee meetings, and community advocacy workshops.

Pi Kappa Alpha International Fraternity

Memphis, TN

Consultant:

Jun. 2019 – May 2021

- Managed portfolio of 18 chapters across North America by performing 18 quantitative & qualitative on-site and virtual consultations.
- Utilized CRM to recruit provisional organization at Francis Marion University by recruiting 40 men, eclipsing campus average of 13.
- Promoted to Senior Consultant, resulting in a 25 chapter portfolio, large group presentations regarding recruitment and health & safety.
- Aided Fraternity in critical transformation to meet the needs of undergraduates and alumni leaders in the virtual environment.

Virginia General Assembly

Richmond, VA Jan. 2019 – Feb. 2019

Legislative Intern:

- Provided daily updates on legislation to senior staff by tracking advancement of legislation throughout the legislative process.
- Drafted correspondence to send to families of the deceased by researching district obituaries and cross-referencing with constituent list.
- Hosted daily meetings with lobbyists and government relations professionals and informed senior staff of relevant information.

U.S. Senator Mark Warner, District Office

Norfolk, VA

Intern:

Sept. 2017 - Nov. 2017

- Utilized Intranet Quorum to organize and assign the daily constituent inquiries made via email, fax, and phone call to proper staffers.
- Drafted congratulatory letters by researching Commonwealth for major achievements and sent to senior staff for approval.

To: The Honorable Elizabeth W. Hanes, United States District Judge for the Eastern District of Virginia

From: Tarik J. Terry

Date: June 15, 2023

Re: Writing Sample

As a spring law clerk with Wolff Ardis, P.C., I prepared the document below. This memorandum provided an explanation and analysis of an ERISA claim. This case is still pending. To preserve confidentiality, some portions have been edited or omitted. For example, names have been replaced with "Plaintiff," "Defendant A," and "Defendant B." I have received permission from Wolff Ardis, P.C. to use this memorandum as my writing sample.

To: Daniel Parish, Principal, Wolff Ardis, P.C.

From: Tarik J. Terry

Memo: ERISA Claim

ISSUE

Whether an employer will be liable to a beneficiary for breach of fiduciary duties under the Employee Retirement Income Security Act of 1974, when the employer enrolled the decedent in the employee benefit plan, collected life insurance premium payments, discontinued life insurance premium payments, and did not inform decedent or decedent's plan beneficiary of such termination.

* * *

LAW

The Employee Retirement Income Security Act of 1974 ("ERISA" or "the Act") governs an employee benefits plan should an employer choose to offer one. The underlying policy is to create uniform policies and rights for employee benefit programs. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). Because of this policy goal, the cause of action created by ERISA is exclusively a federal cause of action. 29 U.S.C. § 1132(a)(1)(B); 1144(b)(2)(A); 1144(a) (1974).

ERISA creates a cause of action for employees and their beneficiaries when a plaintiff with standing proves a breach of fiduciary duty. *See* 29 U.S.C. § 1109(a). Plaintiffs have standing under ERISA when they meet one of the criteria under 29 U.S.C. § 1132(a)(1)-(11). Under ERISA, a fiduciary of a plan includes any legal person with discretionary authority or control over the management or administration of a benefits plan; or renders investment advice regarding the money or property in a compensation plan. 29 U.S.C. § 1002(21)(A)(i)-(iii). A person cannot contract away their fiduciary status. 29 U.S.C. § 1110(a). When a person is a fiduciary, ERISA

requires the fiduciary to act solely in the interest of the plan's participants and beneficiaries. § 1104(a).

DISCUSSION

Under ERISA, a claim for breach of fiduciary duties requires the plaintiff to prove (1) that the defendant is a plan fiduciary; (2) the defendant breached their fiduciary duty; and (3) the breach of fiduciary duty resulted in harm to the plaintiff. *See Pegram v. Herdich*, 530 U.S. 211, 226 (2000) (describing the threshold question in charging breach of fiduciary duty "is whether [the] person was acting as a fiduciary when taking the action of subject to complaint."). Thus, the most critical inquiry is the threshold question of whether the defendants were fiduciaries.

1. Whether the defendants are fiduciaries.

The first issue a court will consider is whether the defendants are fiduciaries. Under ERISA, a person is a fiduciary of a plan if the person is named as a fiduciary in the plan or does any of the following:

(i) exercises discretionary authority or control with respect to the management of the plan including the disposition of its assets; (ii) renders investment advice regarding the money or property in the plan for compensation, directly or indirectly or has any authority or responsibility to do so; or (iii) has discretionary authority or responsibility in the administration of the plan.

29 U.S.C. § 1002(21)(A)(i)-(iii). Whether the person had discretion in authority or administration of the plan is the most precise inquiry. *See Pohl v. Nat'l Benefits Consultants*, 956 F.2d 126, 129 (7th Cir. 1992) (describing discretion as absolutely necessary for fiduciary status). However, discretion may be permitted regarding one function but not another; thus, a person is only a fiduciary to the plan or portions of the plan over which the person exercises discretionary authority or control. *See Briscoe v. Fine*, 444 F.3d 478, 486 (6th Cir. 2006).

The Sixth Circuit applies a functional approach by focusing on a person's actions, rather than their official designation under the plan, to determine fiduciary status. *See Deschamps v. Bridgestone Americas, Inc. Salaried Employees Retirement Plan*, 840 F.3d 267, 277 (6th Cir. 2016) ("we use a functional approach, looking to whether it acts in a fiduciary capacity with respect to the conduct at issue."). The standards for deciding whether a person is a fiduciary are liberally interpreted to uphold the broadly protective purposes of ERISA. *Wallace v. Intern. Paper Co.*, 509 F. Supp. 1045, 1052 (W.D. Tenn. Dec. 23, 2020).

Under section 1002(21)(A)(i), a person is a fiduciary if the person "exercises discretionary authority or control" over the management of the plan. The Sixth Circuit recognizes an insurance company as a fiduciary when the company has authority to grant or deny claims. *Guardsmark, Inc. v. BlueCross and BlueShield of TN*, 169 F. Supp. 2d 794, 800 (W.D. Tenn. Oct. 22, 2001). It is necessary to distinguish authority to grant or deny claims from, without more, merely paying the claims. *See Flacche v. Sun Life Assur. Co. of Canada (U.S.)*, 958 F.2d 730, 735 (6th Cir.1992). For example, in *Guyan Intern., Inc. v. Professional Benefits Adm'rs, Inc.*, a third-party administrator, PBA, was hired and tasked with paying medical providers for claims filed under an employee benefit plan. 689 F.3d 793, 797 (6th Cir. 2012). The third-party administrator collected the money, held the money in separate accounts for each plan to which the administrator made the deposits, and paid out the claims by writing checks from the appropriate account. *Guyan Intern., Inc.*, 689 F.3d at 798. There, the court held that PBA's authority to write checks on the Plan accounts and control over where and when deposited funds were disbursed. *Id.* at 798. Thus, fiduciary status includes third-party administrators that exercise "practical control over an ERISA plan's money." *Id.*

* * *

Under section 1002(21)(A)(iii), a person is a fiduciary if the person has discretion over the administration of the plan. Plan administration broadly includes any activity that achieves the objectives of the benefit plan through "ordinary and natural means" such as "[c]onveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation." *Variety Corp v. Howe*, 516 U.S. 489, 502-03 (1996). Further, plan administration includes offering information to help beneficiaries determine whether to retain the benefit plan. *Id.* at 503. In *Deschamps*, the defendant functioned as a fiduciary when confirming that the plaintiff's service date would allow the plaintiff to receive pension credit for plaintiff's years of employment. 840 F.3d 267, 278 (6th Cir. 2016). The Court deemed this action to be discretionary under ERISA because the defendant was deciding how the plan, as it pertained to the plaintiff, would be administered. *Id.* Further, in *Parks v. Fin. Fed. Sav. Bank*, the defendant performed services such as deciding who was eligible under the plan and accelerating processes so the benefits would begin immediately. 345 F. Supp. 2d 889, 896 (W.D. Tenn. 2004). In doing so, the Court determined the defendant invoked a fiduciary status because the defendant had discretion as to the administration of the plan under section 1002(21)(A)(iii).

The Department of Labor has enacted interpretive bulletins that also define the term fiduciary. *See* 29 C.F.R. § 2509.75–8 D–2. This regulation describes that a person who performs "purely ministerial tasks" for an employee benefit plan within the framework of policies made by other persons is *not* a fiduciary. *Id.* The regulation lists numerous examples:

- (1) Application of rules determining eligibility for participation or benefits;
- (2) Calculation of services and compensation credits for benefits;
- (3) Preparation of employee communications material;
- (4) Maintenance of participants' service and employment records;
- (5) Preparation of reports required by government agencies;
- (6) Calculation of benefits;
- (7) Orientation of new participants and advising participants of their rights and options under the plan;

- (8) Collection of contributions and application of contributions as provided in the plan;
- (9) Preparation of reports concerning participants' benefits;
- (10) Processing of claims; and
- (11) Making recommendations to others for decisions with respect to plan administration.

Id. At least one circuit has recognized that liability may follow where an employer-fiduciary fails to train an employee that performs purely ministerial tasks. See Kenseth v. Dean Health Plan, Inc., 610 F.3d 452, 465 (7th Cir. 2010). Further, there is no discretionary authority when a clerical employee, performing purely ministerial tasks, incorrectly enters data or applies a formula. Guardsmark, Inc., 169 F. Supp. 2d at 800 (citing IT Corp. v. General American Life Ins. Co., 107 F.3d 1415, 1421 (9th Cir.1997)). However, if an employee interprets elaborate policies, makes judgments on benefit plans, or "has final authority to accept or deny benefit payments," then the corporation and the employee as an agent will likely be considered fiduciaries. Id.

In Walker v. Federal Exp. Corp., the third-party contractor, ADP, mailed conversion notices and collected biographical information. 492 Fed. Appx. 559, 565 (6th Cir. 2012). The Court held that ADP was not a fiduciary because the agreement between the corporation and ADP expressly stated ADP was not an administrator, plan administrator, nor a fiduciary, and only performed administrative functions. Id. Likewise, the defendants in Briscoe v. Fine, were not fiduciaries because the defendants, as the board of directors, merely hired the third-party plan administrator; and thus, conducted a purely ministerial task. 444 F.3d 478, 487-88 (6th Cir. 2006); Baxter v. C.A. Muer Corp., 941 F.2d 451, 455 (6th Cir. 1991) (per curiam) ("a person without the power to make plan policies or interpretations but who performs purely ministerial functions such as processing claims, applying plan eligibility rules, communicating with employees, and calculating benefits, is not a fiduciary under ERISA"); Flacche v. Sun Life Assur. Co. of Canada,

958 F.2d 730, 734 (6th Cir. 1992) (holding the company performed purely ministerial tasks by merely paying claims and the plaintiff failed to demonstrate that the company had "discretionary control over the management of plan assets or administration of the plan").

However, Chelf v. Prudential Ins. Co. of Am., is a recent and controlling authority that is directly on point. 31 F.4th 459 (6th Cir. 2022). In Chelf, the decedent was an employee of Wal-Mart with a long-term disability. Chelf, 31 F.4th at 462. Decedent switched from short-term disability benefits to long-term disability benefits, and upon approval, the long-term premiums were either paid directly to the insurer by decedent or deducted from decedent's paycheck by Wal-Mart. *Id.* at 463. Decedent also had an optional life insurance policy on which he paid premiums. Id. at 463. Upon Mr. Chelf's death, Ms. Chelf's claim for the optional life insurance benefits was denied by the insurance company and later by the employer, Wal-Mart. Id. at 463. Ms. Chelf contended that Wal-Mart incorrectly terminated Mr. Chelf's life insurance plan and failed to inform Mr. Chelf. Id. at 463. The district court dismissed Ms. Chelf's claim under 29 U.S.C. § 1132(a)(3) because the claim "fell 'outside the scope of ERISA's fiduciary requirements or administrative functions' under 29 C.F.R § 2509.75-8 (D-2)." Id. at 463-64. The Sixth Circuit found that Wal-Mart was a fiduciary because Wal-Mart, "indisputably exercised control over the Plan's assets when it handled Mr. Chelf's premiums, exercised control over the disposition of the Plan's assets, and had discretionary authority over the administration of the Plan." *Id.* at 469. The Court remanded the case on other grounds.

Further, in *Loo v. Cajun Operating Co.*, the plaintiff received supplemental life insurance through their employer's benefit plan and the employer deducted the life insurance premium payments from the plaintiff's paychecks. 190 F. Supp. 3d 704, 708 (E.D. Mich. Jun. 6, 2016). The Court found that the employer was a fiduciary because the employer "processed her premium

payments, and made representations concerning . . . coverage." *Loo*, 190 F. Supp. 3d at 713. Notably, the plan in *Loo* was 'self-administered,' meaning the employer-sponsored and administered the plan. *Id.* By contrast, the court in *Duckworth v. Saks, Inc.*, found that the defendant employer was not a fiduciary because the employer merely collected insurance premiums from the plaintiff's paychecks and redirected them to the insurer. 276 F. Supp. 2d 592, 596 (S.D. Miss. Mar. 20, 2003). Moreover, the defendant employer did not interpret the policy or provide explanations of the plan's provisions. *Duckworth*, 276 F. Supp. 2d at 596. Thus, the defendant employer was not a fiduciary because the employer did not perform any discretionary functions. *Id. See Keger v. Environmental Sys. Prods., Inc.*, 2013 WL1343526 at *4 (N.D. Ohio Mar. 28, 2013) (declining to find fiduciary status when the employer offered the plan, withheld premiums from employee paychecks, and redirected premiums to the insurance company).

This case will unequivocally turn on whether the employer or the insurer exercised *any* discretion on the decedent's plan. *See Pohl*, 956 F.2d at 129 (emphasis added). Like the employer in *Chelf*, which had exclusive control over removing the funds from the plaintiff's paycheck; here, Defendant A had control over the removal of the premium payments from the plaintiff's paychecks. *See Chelf*, 31 F.4th at 469. However, Defendant A will likely argue that they merely performed administrative tasks and had no discretion or control over the assets when they collected the plan contributions from the decedent's paycheck and maintained service and employment records. *See* C.F.R. § 2509.75–8 D–2. The defendant in *Chelf* argued similarly and there, the Court rejected such an argument because of the defendant's control over the administration of the plan. *See Chelf*, 31 F.4th at 469. Further, Defendant B will be considered a fiduciary if the insurance company had any authority to grant or deny claims. *Guardsmark, Inc.*, 169 F. Supp. 2d

at 800. If Defendant A or B are found to be fiduciaries there are no facts to indicate that either entity terminated its fiduciary status prior to the injury alleged by the plaintiff.

2. Whether either defendant breached their fiduciary.

Assuming a defendant is a fiduciary, the next issue a court will consider is whether the defendant breached their fiduciary duty. ERISA requires fiduciaries to discharge their duties exclusively to provide benefits to the participants and their beneficiaries and avoid unreasonable expenses in administering the plan. See 29 U.S.C. § 1104(a)(1)(A)-(D). Further, fiduciaries "must discharge his responsibility 'with the care, skill, prudence, and diligence' that a prudent person 'acting in a like capacity and familiar with such matters' would use." Tibble v. Edison Int'l., 575 U.S. 523, 528 (2015). ERISA fiduciaries cannot contract away their fiduciary status, though they can delegate some fiduciary duties. See Variety Corp v. Howe, 516 489 U.S. 489, 506 (1996); 29 U.S.C. § 1110(a). The standard of review for an employer's decision is de novo. Anderson v. Great West Life Assurance. Co., 942 F.2d 392, 396 (6th Cir. 1991). However, if an explicit grant of discretion was given in the plan, the Court reviews the decision(s) made by the employer under an arbitrary or capricious standard. Id.

Courts have determined that a wide range of conduct can constitute a breach of fiduciary duty. Generally, fiduciaries have duties of loyalty, prudence, and care. *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 547 (6th Cir. 1999). For example, in *Krohn v. Huron Mem'l. Hosp.*, the plaintiff asserted that the defendant employer breached their fiduciary duties by failing to disclose information regarding the benefits plan. 173 F.3d 542, 545-46. The defendant rebutted by arguing that the plaintiff failed to ask the question that would have gained the information the plaintiff alleged was lacking. 173 F.3d at 549. The Court determined that the plaintiff's lack of a specific

request for information did not relieve the defendant's duty to inform when the defendant knew of the plaintiff's eligibility and need for benefits. *Id.* In contrast, in *Vest v. Resolute FP U.S., Inc.*, the Court held that the plaintiff's failure to ask a question at all did not invoke the defendant employer's fiduciary duty to inform the plan participant. 905 F.3d 985, 989 (6th Cir. 2018). Further, the fiduciary was not put on sufficient notice of the plaintiff's need for information and ERISA did not contain a statutory requirement in this case. *Id.* at 987-88.

ERISA does have a statutory requirement to inform the plan participant of termination of the plan "no less than 60 days before the proposed termination date[.]" 29 U.S.C. § 1341(a)(2). This provision only applies to voluntary terminations. *See Pension Ben. Guar. Corp. v. Republic Technologies Int'l.*, *LLC*, 386 F.3d 659, 662 (6th Cir. 2004) ("ERISA does not require PBGC to give formal advance notice to plan participants in involuntary termination proceedings."). The Fourth Circuit stated in *Phillips v. Bebber*, that "strict compliance with the statute is the sole means by which a . . . plan subject to the provisions of ERISA may be terminated." 914 F.2d 31, 34 (4th Cir. 1990). There, the defendant argued they provided notice because the defendant's plan had documents that explicitly stated the benefit plan would terminate upon "dissolution, merger, consolidation, or reorganization of the Company[.]" *Id.* However, the Court remanded the case to terminate the plans in accordance with the statute. *Id.* at 34-35. Alternatively, the Court in *Lynch v. J.P. Stevens & Co., Inc.*, held that the defendant's notice of termination was sufficient when the defendant issued a press release stating the proposed termination, mailed letters to participants, and posted to interested parties that the plan would be terminated. 758 F. Supp. 976, 1014-1015 (D. N.J. Feb. 14, 1991).

In Gallien v. Conn. Gen. Life Ins. Co., employees were provided with life insurance policies in accordance with their salaries. 851 F. Supp. 547, 549 (S.D.N.Y. Apr. 13, 1994)

overruled on other grounds 49 F.3d 878 (2nd Cir. 1995). The employer paid premiums from the employee's paychecks to the insurer and retained the contractual right with the insurer, to terminate the plan at any time. Gallien, 851 F. Supp. at 549-50. The plaintiff, a beneficiary on the decedent's employee benefits plan, was informed by the insurer that the employer had discontinued payments prior to the decedent's death; and thus, had no rights or interests in the death benefits. *Id.* at 551. The Court found that the employer had breached its fiduciary duty by failing to notify decedent or the plan beneficiary that it had discontinued payment of the insurance premiums. Id. at 553. Further, the court cited cases from the Third and Fourth Circuits noting that "[i]t is well established that a fiduciary is obligated to notify insureds, such as Gallien, of the employer's failure to pay premiums as provided by the insurance agreement." Id. See also Rodriguez v. MEBA Pension Trust, 872 F.2d 69, 74 (4th Cir. 1989) (requiring notice of changes in a plan's provisions to plan participants and that an opportunity for the participant to take action must be given after such notice), cert. denied, 493 U.S. 872 (1989);1 Rosen v. Hotel and Restaurant Employees & Bartenders Union, 637 F.2d 592, 599-600 (3d Cir. 1981) (finding that fiduciary obligations minimally required a trustee to notify the employee of the employer's failure to contribute to the pension fund as required by the pension agreement), cert. denied, 454 U.S. 898 (1981).

Here, the Plaintiff will assert that Defendant A breached their fiduciary duty by violating the notice of termination requirement under section 1341(a)(2). Plaintiff can assert that Defendant A never notified Plaintiff that the plan was terminated in 2017. Unlike the intentional effort to provide notice by the defendants in *Lynch*; here, there was no effort to notify the plaintiff of termination of benefits. 758 F. Supp. At 1014-15. This argument is further supported by holdings

The Sixth Circuit has declined to follow this case on other grounds. See Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund, 979 F.2d 444, 454 (6th Cir. 1992) (declining to follow Rodriguez regarding whether denial of benefits, in of itself, constitutes an act or omission).

from multiple sister circuits that have found liability where the defendant employer, a fiduciary, neglects to inform the plan participant that benefits have been terminated. *See Rodriguez*, 872 F.2d at 74; *Rosen*, 637 F.2d at 599–600.

* * *

3. Whether the breach of fiduciary duty resulted in harm to the plaintiff.

Lastly, assuming Defendant A is a fiduciary and breached their fiduciary duties; the plaintiff must then prove that the breach of fiduciary duty resulted in harm to the plaintiff. Under section 1132(a)(1)(B), a plaintiff may bring a civil suit to recover benefits due, enforce their rights under the plan, or "clarify rights to future benefits." Further, the plaintiff may "enjoin any act . . . which violates any provisions of the [Act] or the terms of the plan, or to obtain other appropriate equitable relief" 29 U.S.C. § 1132(a)(3).

However, plaintiffs are precluded from recovering compensatory and punitive damages for breach of fiduciary duties under ERISA. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) (holding that Congress did not intend to authorize remedies not listed in the 29 U.S.C. § 1132(a)); *Allinder v. Inter-City Prods. Corp.*, 152 F.3d 544, 552 (6th Cir. 1998) (holding the district court was correct in dismissing the action because the compensatory and punitive damages sought were unavailable as a matter of law). Thus, ERISA plaintiffs are limited to equitable remedies, which the Supreme Court has interpreted rather broadly.

In *Mertens v. Associates*, the Supreme Court established that equitable relief under an ERISA claim was limited to "typical equitable remedies" such as injunction, mandamus, or restitution and intentionally excluded compensatory damages from this list. 508 U.S. 248, 256-57 (1993). Subsequently, in *CIGNA Corp. v. Amara*, plaintiff employee filed suit against their employer for failing to provide notice of significant changes to the benefits plan. 563 U.S. 421,

423 (2011). While the lower courts held in favor of reforming the benefit plan and enforcing the employer to follow the reformed benefit plan, through which the plaintiffs would be able to recover; the Supreme Court disagreed because reformation of the plan was outside the scope of section 1132(a)(1)(B). The Court distinguished *Mertens* from *Amara* by noting that *Mertens* applied in the limited setting in which the defendant is a non-fiduciary. *Amara*, 536 U.S. at 442.

The Sixth Circuit has two diametrically opposed conclusions on "appropriate equitable relief," both of which were prior to Amara. In Alexander v. Bosch Automotive Sys., Inc., the Court held that the plaintiff could not recover monetary damages. 232 Fed. Appx. 491, 501 (6th Cir. 2007). Relying on Mertens, the Alexander Court reasoned that reformation of the benefits plan, an equitable remedy prescribed by the District Court, would lead to the recovery of monetary damages which was excluded under "appropriate equitable relief" because the plaintiffs would not be able to show that the damages sought were "traceable and readily identifiable." Alexander, 232 Fed. Appx. At 500-01 (citations omitted). By contrast, in Krohn, whose facts were discussed earlier, the Court found that the plaintiff was able to recover lost benefits because the plaintiff would not have recovered through any other cause of action under ERISA. Krohn, 173 F.3d at 551. Thus, recovery of monetary damages in Krohn was permitted as an "appropriate equitable remedy." Id. Despite the conflicting outcomes, district courts in the Sixth Circuit have concluded that Krohn controls and a plaintiff may recover compensatory damages. Accord Teisman v. United of Omaha Life Ins. Co., 908 F.Supp.2d 875, 878 (W.D.Mich.2012) ("when a fiduciary is involved, compensatory relief is a 'typical equitable remedy' available under § 1132(a)(3)"); Weaver v. Prudential Inc. Co., 2011 WL 4833574 at *13 (holding Krohn controlled; and thus, the plaintiff could recover the value of the life insurance benefits); United States v. Ennenga, 263 F.3d 499, 504 (6th Cir. 2001) (holding that unpublished decisions are not controlling).

Here, plaintiff was informed that she would not be entitled to the decedent's life insurance benefits because Defendant A discontinued premium payments. The plaintiff is permitted to bring a civil action for the breach of fiduciary duty under section 1132(a)(1)(B). Like the plaintiff in *Krohn*, who exhausted all other remedies prior to seeking monetary relief; here, Plaintiff has exhausted all the remedies including mediation. *See Krohn*, 173 F.3d at 551. Thus, the equitable remedy under the statute is the only remaining opportunity for Plaintiff to recover. Unlike the monetary relief sought in *Alexander* which was considered untraceable and not "readily identifiable;" here, the monetary relief sought is explicitly stated in the life insurance policy. Further, Plaintiff's monetary relief can be traced from the decedent's life insurance policy which decedent enrolled in through Defendant A. The life insurance policy would have been in effect upon decedent's death had Defendant A continued premium payments. Defendant A's inexplicable discontinuance of premium payments is the sole reason Plaintiff is seeking the remedy.

* * *

Applicant Details

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Date of JD/LLB May 15, 2024

Class Rank 25% Law Review/Journal Yes

Journal of the National Association of

Administrative Law Judiciary

Moot Court

Experience

No

Bar Admission

Prior Judicial Experience

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Yes

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

MARY TROTTER

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May 30, 2023

The Honorable Juan Sánchez 601 Market Street, Room 11614 Philadelphia, PA 19106-1741

Dear Judge Sánchez,

I am a rising third-year student at Pepperdine Caruso School of Law and an aspiring Federal Public Defender. I am writing to apply for a clerkship in your chambers for the term beginning fall 2024. My path to law school was guided by my prior experience working as a teacher in an urban, low-income area, and I am committed to using my legal education to fight for our most vulnerable people. My experience at the Federal Public Defender in Washington, D.C. has provided me with valuable insight into how federal criminal law and cases operate, and I hope to apply this knowledge in your chambers. I also have deep connections to Philadelphia, including a community of friends from my time as an undergraduate at Villanova University, as a teacher in Wilmington, Delaware, and as an intern for Judge R. Barclay Surrick, and I hope to practice in Philadelphia upon graduation. It would be an honor to work alongside you and learn from you while assisting in chambers and serving justice.

I greatly enjoy legal research and writing, and my experiences highlight that I excel in both of these critical skills to clerk in your chambers. For example, I thrived in my first year Legal Research and Writing course, where I received the highest grade in my class. Additionally, I utilized my writing skills my 1L summer in my federal judicial externship for Judge Surrick, where I learned to methodically approach complex legal questions and produce thoroughly researched and concisely written memoranda. The strong writing and advocacy skills I developed in class and at my externship served me well in the Community Justice Clinic at Pepperdine last fall, where I drafted talking points and helped a client advocate for their nonprofit in front of the Malibu City Council, and on the Journal of National Association of Administrative Law Judiciary, where my note has been recently accepted for publication.

My research and writing skills have further developed through my experience at the Federal Defenders, where I have become more adept in my writing through the process of pre-writing and outlining. At the Federal Defenders, I have learned to analyze complicated cases and draft persuasive motions and briefs for clients under tight deadlines. I also have recently been accepted to the Ninth Circuit Appellate Advocacy Clinic at Pepperdine, where I will spend my 3L year briefing and then arguing a case before the Ninth Circuit. I have flourished in my collective writing and advocacy experiences, and am eager to continue to grow in my legal writing.

Serving in your chambers will be fulfilling and will equip me with additional tools to become an excellent advocate at the federal level. Enclosed are my resume, writing sample, letters of recommendation, and transcript for your review. Thank you for your consideration in my application. I hope to speak with you further about this opportunity.

Respectfully,

Mary Trotter

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EDUCATION

Pepperdine Caruso School of Law

Malibu, CA

May 2024

Juris Doctor Candidate

<u>GPA</u>: 3.475 (top 25%)

Honors: CALI Award (for highest grade) in Legal Research and Writing; High Pass in Justice Clinic

Journal: National Association of Administrative Law Judiciary, Managing Editor

Activities: Teaching Assistant, Legal Research and Writing; Moot Court Board; Ninth Circuit Appellate

Advocacy Clinic, Horvitz & Levy LLP (forthcoming Fall 2023 to Spring 2024)

<u>Publications</u>: Unclear Guidelines from the Sentencing Commission and Prejudiced Warden Result

Uncompassionate Release, J. NAT'L ASS'N ADMIN. L. JUDICIARY, (forthcoming 2023)

Relay Graduate School of Education

Wilmington, DE

Master of Art in Teaching: English and Special Education (Dean's List, 4 semesters)

June 2020

Villanova University

Villanova, PA

Bachelor of Arts, Philosophy and Classical Studies (Dean's List, 4 semesters)

May 2016

Activities: Study Abroad: The Netherlands 2014 and South Korea 2015; Alpha Chi Omega Sorority

PROFESSIONAL EXPERIENCE

Legal Aid Society, Criminal Defense Division

Bronx, NY

Legal Intern

June 2023 – August 2023

Federal Public Defender for the District of Columbia

Washington, D.C.

Legal Intern

January 2023 – May 2023

- Researched and drafted motions on various legal topics including federal sentencing guidelines, parole revocation, firearm offenses, sentencing disparities, obstruction of justice, and Color of Law violations
- Wrote mitigation letters to Government based on past educational and medical reports for client
- Drafted argument section of appellate brief distinguishing direct and collateral consequences

United States District Court for the Eastern District of Pennsylvania

Philadelphia, PA

Judicial Extern to the Honorable R. Barclay Surrick

May 2022 – August 2022

- Evaluated merits of motions, and researched and drafted legal memoranda on civil-procedure issues,
 racketeering claims, the Family Medical Leave Act, and circuit splits for applying the Anti-SLAPP law
- Observed trials and proceedings, and discussed ruling strategy with Judge Surrick and his law clerks

Skikos, Crawford, Skikos & Joseph LLP

San Francisco, CA

Narrative Writer

May 2021 - August 2021

Interviewed people injured in the 2018 Camp Fire and drafted narratives requesting damages

Freire Charter School Wilmington (Teach for America)

Wilmington, DE

Special Education Teacher, Volleyball Coach, Math Tutor

June 2018 – June 2021

- Created and implemented English and Math lessons for high school students with learning disabilities
- Developed IEPs for students that highlights students' goals, accommodations, supports, and services

West Athens Elementary

West Athens, CA

Teacher's Assistant, Transitional Kindergarten (T.K.)

January 2018 – June 2018

Fulbright Scholar

Kota Samarahan, Malaysia

English Teaching Assistant and Cultural Ambassador for the U.S.

January 2017 – November 2017

Taught secondary students English, in collaboration with Malaysian teachers

Maravich & Associates

Los Angeles, CA

Fundraising Intern

July 2016 – December 2016

ADDITIONAL INFORMATION

College Work: Jack Wills, Sales Associate (2013-16); Nanny (2015-16)

Volunteer: RAD Camp Counselor (2011-20), Ruibal Tutoring (2012-16), Best Buddies (2012-16)

Interests: Running, Peloton stationary biking, skiing, playing guitar

Unofficial Transcript

Name : Mary Katharine Trotter

Print D	ate : 20	23-05-17					RE() DESTGNATIO	N : Experienti	al Course			
Academic Program History					LAW	310	•		3.00	3.00 HP			
Program	Program : School of Law						LAW 310 Community Justice Clinic 3.00 3.00 HP REQ DESIGNATION: ABA Experiential Course						
2021-07	2021-07-08 : Active in Program						LAW	742	Con Law-Ind		3.00	3.00 A	12.000
2021-07-08 : Juris Doctor Major							LAW	822	Criminal Pro	-	3.00	3.00 B	9.000
External Degrees					LAW	824	Wills & Trus	ts	3.00	3.00 A	12.000		
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			Fall 2021					CUM GPA	: 3.482	CUM TOTALS :	46.00	46.00	132.330
<u>Course</u>		Description		Attempted	Earned Grade	<u>Points</u>		0011 0111	. 5.102		10.00	10.00	102,000
LAW	181	Legal Research	I	2.00	2.00 A+	8.660				Spring 2023			
REQ	DESIGNATIO	N : Experiential	Course				<u>Course</u>		<u>Description</u>	opring rors	Attempted	Earned Grade	<u>Points</u>
LAW	622	Criminal Law		3.00	3.00 A-	11.010	LAW	18	Moot Court B	oard	1.00	1.00 P	
LAW	654	Torts		5.00	5.00 A-	18.350	LAW	52	NAALJ Journa		2.00	2.00 P	
LAW	754	Civil Procedure	e	5.00	5.00 B	15.000	REC) DESIGNATIO	N : Course Sat	isfies a Writing	Intensive R		
	TERM GPA	: 3.535	TERM TOTALS :	15.00	15.00	53.020	LAW	300	Externship	,	10.00	10.00 P	
							REC) DESIGNATIO	N : ABA Experi	ential Course			
	CUM GPA	: 3.535	CUM TOTALS :	15.00	15.00	53.020	LAW	2432	Advanced Leg		2.00	2.00 P	
									-	isfies a Writing 1			
			Spring 2022				LAW	2692		tion's Capital	2.00	2.00 B+	6.660
<u>Course</u>		<u>Description</u>		Attempted	Earned Grade	<u>Points</u>		TERM GPA		TERM TOTALS :	17.00	17.00	6.660
LAW	182	Legal Research	II	2.00	2.00 A	8.000							
REQ	DESIGNATION	N : Experiential	Course					CUM GPA	: 3.475	CUM TOTALS :	63.00	63.00	138.990
LAW	614	Contracts		5.00	5.00 B+	16.650	Law Car	eer Totals					
LAW	714	Property		5.00	5.00 B	15.000		CUM GPA	: 3.475	CUM TOTALS :	63.00	63.00	138.990
LAW	733	Constitutional	Structure	2.00	2.00 B+	6.660	School	of Law Cumu	lative GPA:		3.475 Uni	ts Toward GPA	: 40.00
	TERM GPA	: 3.308	TERM TOTALS :	14.00	14.00	46.310				End of Transcrip	ot	-	
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	CUM GPA	: 3.425	CUM TOTALS :	29.00	29.00	99.330							
<u>Course</u>		<u>Description</u>	Fall 2022	Attempted	Earned Grade	<u>Points</u>							
LAW	18	Moot Court Boa	nd		0.00 P								
			Lu	2.00									
LAW	52	NAALJ Journal		2.00	2.00 HP								

Mary Trotter

Page 1 of 1



February 15, 2023

U.S. District Judges Via OSCAR

RE: Recommendation Letter for Mary Trotter

Dear Judge:

Without reservation and with my highest confidence in her intellect, work, and character, I recommend Mary Trotter for a clerkship in your court. Ms. Trotter is an exceptionally bright, creative, and dedicated professional. She is smart, hard-working, curious, courageous, and courteous. Her talent and industry will enhance the court's capacity to render justice and to serve and our republic.

I have taught and practiced law with Ms. Trotter at Pepperdine Caruso School of Law and am thoroughly acquainted with her work. She learned and worked in the Community Justice Clinic this year. Under my supervision, students in the Clinic serve nonprofits, NGOs, and community organizations. She thrived in our law practice. For an international NGO, she analyzed appellate opinions from India's high court on sentencing practices in traumatic cases of abuse. For a local, minority-led nonprofit, she dug deep in preparation for a complex application for tax-exemption. For another community organization, she worked on a close, nuanced writing project to provide compliance counsel for minoritized women starting small businesses. Most notably, she volunteered to help a local nonprofit navigate some serious obstacles presented by local government; for this client she researched local laws, counseled the client's leadership through their options, wrote talking-points and coached them in their self-advocacy; attended a city council meeting; and addressed the council on the client's behalf. The council addressed the obstacles, cleared them for the client's continued work in the community, and complimented Ms. Trotter on her work. It was a great outcome, thanks to her effective, creative, quick lawyering.

Ms. Trotter demonstrated excellent, lawyerly virtues and talent. I am confident in her work, understanding and creativity. Her writing is sharp and effective, and her judgment is mature and critical. She is brave and curious. She collaborates with her classmates and colleagues with humility, integrity and confidence. Ms. Trotter is an excellent law student, and she will soon be an excellent lawyer of the highest order. She would serve your vital work with care and integrity. Please contact me at your convenience if I may provide any more information or insight for your consideration of her application.

Sincerely

Jeffrey R. Baker

Clinical Professor of Law

Associate Dean of Clinical Education and

Global Programs

Pepperdine University | 24255 Pacific Coast Highway | Malibu, CA 90263 p. 310.506.7449 | f. 310.506.6596 | clinicallaw@pepperdine.edu | law.pepperdine.edu

PEPPERDINE | CARUSO

School of Law

June 01, 2023

The Honorable Juan Sanchez James A. Byrne United States Courthouse 601 Market Street, Room 14613 Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Mary Trotter for a judicial law clerk position in your chambers starting in 2024. Mary is a smart, hardworking student who is dedicated to service for others. I clerked for the Ninth Circuit and the District of Connecticut, and now I am the Co-Director of the Pepperdine-Federal Judicial Center Judicial Clerkship Institute. Based on my experience and my knowledge of Mary, I know she will be an excellent addition to your chambers.

Mary is a true scholar of the law. She earned the CALI Award for the highest grade in my first-year Legal Research and Writing class last year, and she has excelled in her studies at Pepperdine. She frequently attends office hours and asks questions that benefit others. In my class, Mary's written work and insightful class comments consistently showed her understanding of complex legal concepts. Mary earned the highest grade I have ever awarded on our multi-issue objective memorandum, and her appellate brief research and writing were also excellent.

I was delighted when Mary applied to be a Teaching Assistant for the 2022-23 year. She has been a wonderful, dedicated TA, and I hope she will return as one of my TAs next year. My students appreciate her quick grasp of our problems as well as her willingness to help with anything from small Bluebook questions to sophisticated analogies and distinctions.

Mary also has a strong work ethic and a demonstrated commitment to justice. Before law school, Mary worked with Teach for America as a special education teacher. Last summer, Mary externed for Judge R. Barclay Surrick of the Eastern District of Pennsylvania. She loved the intellectual, problem-solving aspects of externing, and was proud to help in chambers. This spring, Mary will be a Legal Intern for the Federal Public Defender for the District of Columbia, and she will continue her work for the public interest next summer at the Legal Aid Society's Bronx Criminal Trial Office. Mary will bring this wonderful experience and dedication to service to a judicial law clerk position.

Additionally, Mary's open, warm personality is an excellent fit for the close, collegial chambers environment. She approaches everything she does with intellectual curiosity and a happy, friendly attitude. Finally, Mary has lived many places and is willing to relocate for a clerkship.

In summary, Mary is a genuine, bright, and dedicated student. I recommend her without reservation. If I can add any additional information, please contact me at stephanie.williams@pepperdine.edu or 818-312-0796.

Sincerely,

/s/

Stephanie Rae Williams Assistant Professor of Legal Research and Writing Co-Director, Judicial Clerkship Institute

Lindsay Burrill-VanDellen

Law Clerk to the Honorable R. Barclay Surrick U.S. District Court, E.D. Pennsylvania

Telephone: (616) 914-0827

Email: Lindsay_BurrillVanDellen@paed.uscourts.gov

November 14, 2022

To Whom it May Concern,

It is my pleasure to recommend Mary Trotter for a clerkship position. I am a law clerk for the Honorable R. Barclay Surrick in the Eastern District of Pennsylvania and a graduate of Villanova University's Charles Widger School of Law. I oversaw and directed Mary's work as a legal intern for Judge Surrick during the Summer of 2022.

Mary was an excellent intern and a pleasure to work with. She is diligent, hardworking, and a quick learner. I worked on a handful of legal research and writing assignments with her, as did my colleagues, and we all agree that Mary did an excellent job with being assigned projects in complex legal matters, especially considering that she only had one year of law school under her belt at the time. She is a strong writer and has great research skills, which she applied to her various projects.

Mary particularly demonstrated these skills in her work on a motion to strike in an Individuals with Disabilities Education Act matter. She independently researched all aspects of the motion and, with guidance from the law clerks, formulated a recommendation for the Judge on what she believed was the correct disposition of the motion. She then presented it verbally to Judge Surrick. With his approval, she then drafted the footnoted order. Mary also comprehensively researched issues surrounding necessary and indispensable parties in an insurance dispute and drafted a footnoted order addressing the issues that the parties raised. Finally, Mary conducted a survey of case law about applying state Anti-SLAPP laws in federal court.

Aside from her academic abilities, Mary is collaborative, inquisitive, and quick-thinking. As our only intern for the summer, she also worked well independently, but was not afraid to follow up and ask questions if needed. In addition to these qualities, Mary showed a passion for fairness and equity, which is an important quality for a law clerk. We all really enjoyed working with her, and I would highly recommend her for a clerkship position.

If you have any further questions, please feel free to contact me at (616) 914-0827 or Lindsay_BurrillVanDellen@paed.uscourts.gov. Judge Surrick would also be happy to speak with you about Mary and I can set up a call with him upon request.

Thank you for your time.

/s/ Lindsay Burrill-VanDellen
Lindsay Burrill-VanDellen

MARY TROTTER

237 North 2nd Street, Philadelphia, PA 19106 • 562-896-7626 • Mary.trotter@pepperdine.edu

WRITING SAMPLE

I drafted the attached writing sample in my second semester Legal Research and Writing course. The assignment required drafting an Appellate Brief with a partner on two issues: false advertising and trademark infringement. The assignment asked us to explain why the court should affirm the judgment that our client, Appellee SAFERover, was not liable for false advertising or trademark infringement based on their pet stroller advertisement. I independently wrote on false advertising, and my partner wrote on trademark infringement. Together my partner and I wrote the statement of the case, which I have not attached, however I can provide them upon request. I wrote my own issue statement, summary of argument, and argument for our client attached below.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. To prove actionable facts which are false and misled consumers under a false advertising claim, plaintiff must show defendant's advertisement made a measurable, specific statement, not a subjective, general, or boastful statement, which is unquestionably incorrect or false on its face without context, or an impliedly false and thus misleading claim, which deceived a substantial portion of consumers proved through testimony or surveys. SAFERover's ad contained exaggerated claims about safety, happiness, and pampering like "years of happy tails" and "industry leader in safety," facts about its UL certification, COVID-19, and organic materials, like "certified organically-grown cotton and latex," and only fourteen percent of consumers thought SAFERover's stroller was solely organic, while some customers asked for a discount on PetRover's stroller, and one retailer mistook the products. Did SAFERover falsely advertise?

SUMMARY OF THE ARGUMENT

I. Boasting about the value and price of a product is not actionable false advertising. This court should affirm the district court's judgment because statements on SAFERover's advertisement are either puffery or literally true, and not misleading.

SAFERover's ad contains many statements of nonactionable puffery because they are general or boastful and no reasonable consumer would rely on them. Actionable statements are specific, measurable, and verifiable. SAFERover's ad displays superiority through vague, specific statements about its product's value, price, materials and safety, and consumers would view these as opinions. Further, these statements are not measurable, cannot be proved false, and are not actionable under the Lanham Act.

The remaining statements on the advertisement are true. Courts find falsity when statements are unquestionably contrary to the evidence or statements are false on their face, without review of context. SAFERover's advertisement contains statements about the safety features, like its enhanced safety screen, and the materials, like its organically grown cotton and latex, which are true facts. The SAFERover ad contains a UL certification logo, but underneath it reads "pending," because the application is incomplete and still on file. SAFERover has an advertisement about COVID-19, and the CDC said pets could still get COVID-19 from humans; accordingly an "enhanced screen" could truly protect pets from COVID-19. Further, the ad contains no literally false statements.

The true statements on the ad are not misleading because they are not impliedly false and PetRover did not prove significant consumer confusion. Only fourteen percent of consumers believed SAFERover's stroller was solely organic and as safe or safer than PetRover's stroller, and although SAFERover and PetRover's strollers did not contain identical materials and SAFERover's UL application is incomplete, fourteen percent confusion is not substantial. Plaintiffs must show substantial consumer confusion with evidence like reaction tests or surveys. PetRover displayed evidence of PetRover customers asking for price reductions and a retailer confusing the products, but this is minimal, and does not show substantial confusion. Therefore, because eighty-six percent of consumers were not confused, there is no deception from SAFERover's stroller.

Accordingly, most of SAFERover's statements are non-actionable puffery, the remaining statements are true, and PetRover lacked evidence of consumer deception through reaction or surveys. Therefore, this court should affirm.

ARGUMENT

I. SAFEROVER DID NOT ADVERTISE FALSE OR MISLEADING STATEMENTS BECAUSE MOST STATEMENTS ARE NON-ACTIONABLE PUFFERY, THE REST ARE TRUE, AND PETROVER DID NOT PROVE THE AD MISLED A SUBSTANTIAL PORTION OF CONSUMERS THROUGH PUBLIC REACTION OR SURVEYS.

PetRover sued SAFERover for false advertising under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), based on SAFERover's pet stroller advertisement. This Act focuses on commercial interests harmed by a competitor's false advertising. IQ Prod. Co. v. Pennzoil Prod. Co., 305 F.3d 368, 375 (5th Cir. 2002). PetRover failed to prove the false advertising elements because PetRover did not prove SAFERover advertised a misleading statement of fact which deceived or tended to deceive consumers, although SAFERover conceded the elements of commerce, materiality, and injury for summary judgment purposes. CT at 3. Courts find only measurable, specific statements actionable, and subjective, general, boastful statements non-actionable, falsity with unquestionably incorrect statements or facial inaccuracies without context, and deception by analyzing if true statements made an impliedly false claim which misled a substantial portion of consumers, shown through public testimony or surveys. Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 496, 497 (5th Cir. 2000); Logan v. Burgers Ozark Country Cured Hams Inc., 263 F.3d 447, 462 (5th Cir. 2001). This court should affirm.

A. Much Of SAFERover's Advertisement Constitutes Mere Puffery Because Statements Like "Happy Tails" And "Rest Easy" Are Vague, Boastful, Not Specific Or Measurable, Where No Reasonable Consumer Would Rely.

Many of SAFERover's statements are merely boasting and non-actionable. Courts find general, subjective, or opinionated claims puffery, and only specific, measurable, and verifiable statements actionable. Pizza Hut, 227 F.3d at 496; Eastman Chem. Co. v. Plastipure, Inc., 775 F.3d 230, 235 (5th Cir. 2014); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997); Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 731 (9th Cir. 1999). In Pizza Hut, Papa Johns advertised "Better Ingredients. Better Pizza," with specific ingredients like "vine ripened." 227 F.3d at 498. In Eastman, a company stated Eastman's product leached harmful chemicals, using a chart claiming the product contained a harmful chemical, EA. 775 F.3d at 234. In Southland Sod, a competitor claimed its turfgrass grew slower than another company's product, advertising "Less is More." and "50% Less Mowing." 108 F.3d at 1138. In Coastal Abstract, a company stated an agent was "too small to handle business" and was "not paying bills." 173 F.3d at 730.

<u>Pizza Hut</u> reasoned "better" ingredients are an "individual taste" and "not subject to scientific quantification," displaying puffery. 227 F.3d at 499. <u>Eastman</u> concluded general opinions are non-actionable, but found "harmful chemicals" listed in a chart are actionable because testing could verify the claim. 775 F.3d at 238; <u>see also Coastal Abstract</u>, 173 F.3d at 732 (stating a company did not pay its bills is capable of being proved false). <u>Southland Sod</u> reasoned "Less is More." is non-actionable because it is "generalized boasting" on which "no reasonable buyer would rely," unlike testable "50%

Less Mowing." 108 F.3d at 1145. <u>Coastal Abstract</u> decided the claim "too small to handle business" was "vague and subjective," not specific, measurable, and "capable of being proved false," like "not paying." 173 F.3d at 731. Accordingly, courts find subjective assertions about the product and opinions about taste where no buyer would rely are non-actionable, but measurable and provable statements like listing chemicals and specific statements like "50% Less Mowing" are actionable.

This court should find SAFERover's safety, happiness, pampering, and value statements are non-actionable puffery, because they are general, subjective opinions that are unprovable. Like <u>Pizza Hut</u> and <u>Southland Sod</u>, where ads stated "better" and slower growing turfgrass, and unlike <u>Eastman</u>, where a competitor listed specific harmful chemicals, SAFERover advertised "years of happy tails," "pamper your pet and wallet," "whole family can rest easy," and SAFERover's value. Like <u>Pizza Hut</u>, <u>Southland Sod</u>, and <u>Coastal Abstract</u>, where competitors stated, "Better Pizza.," "Less is More.," and "could not handle business," SAFERover stated "why pay more?" for other organic pet strollers, "industry leader in safety," and "enhanced safety," but made claims about COVID-19, materials used, and UL certification.

Applying these cases, where testable, quantifiable statements are actionable, and subjective, boastful statements are not, SAFERover's happiness, pampering, and "why pay more?" claims are boastful and not testable. Using Pizza Hut and Eastman, where individual taste and opinions are unprovable, a stroller's value is an unprovable opinion. Applying Coastal Abstract and Southland Sod reasoning where "Less is More.," and "could not handle business" were not actionable because they were merely bragging

and subjective, SAFERover's safety claims are also merely boastful statements about their product. While SAFERover's ad contains facts under <u>Pizza Hut</u>, <u>Southland Sod</u>, and <u>Coastal Abstract</u> about COVID-19, materials used, and UL certification, these courts would reason SAFERover's safety and value claims are merely bragging about its product, and not verifiable or actionable. Under these cases, boastful, vague, subjective statements or opinions should not be reviewed because it does not hurt a consumer.

B. SAFERover's Ad Contains No Literal Falsities, Because The Actionable Statements Like UL Pending Are Indisputably True.

The few facts in SAFERover's ad are not false, because they are verifiably true. Courts find statements literally false on their face when statements are unsupported by evidence or consumers look at a statement and perceive a false message. <u>Logan</u>, 263 F.3d at 462; <u>Eastman</u>, 775 F.3d at 238; <u>Clorox</u>, 228 F.3d at 36. In <u>Logan</u>, a company advertised spiral sliced meat products, but did not sell them. 263 F.3d at 450. In <u>Eastman</u>, a competitor stated Eastman's product contained a harmful chemical, EA, when tests showed it did not. 775 F.3d at 234. In <u>Clorox</u>, a company named its product "Ace con Blanqueador," which translates to the product containing bleach. 228 F.3d at 28.

Logan found a company advertising meat products it did not sell constituted sufficient evidence of falsity. 263 F.3d at 462. Eastman reasoned "tests conducted" which "found no evidence" of harmful substances in Eastman's product proved the chart untrue. 775 F.3d at 238. Clorox reasoned "Ace con Blanqueador" is false if Ace does not contain whitening agents. 228 F.3d at 36. Courts find falsity when the record provides no factual support and consumers perceive a false message.

This court should find SAFERover's organic and safety claims, UL pending logo, and COVID-19 ad true because there is no evidence of inaccuracies or facial falsity. Unlike Logan, Eastman, and Clorox, where companies advertised meat products, harmful substances, and whitener, SAFERover advertised organic materials and safety, plus a UL pending logo because Doug Denali, the founder of SAFERover, sent a prototype, and failed to follow-up. Unlike Eastman, where a competitor stated Eastman's product contained the harmful chemical EA, but tests showed no EA, SAFERover advertised COVID-19 protection, an enhanced screen, and dog masks, and although the CDC said dogs could get COVID-19 from humans, the CDC did not recommend dog masks.

Applying Logan, Clorox, and Eastman where advertising inaccuracies about products shows falsity, the UL pending is accurate because Denali began the process, and believes the application is still pending. Applying Eastman, where testing clearly proved falsity, the CDC was not as clear, stating pets could get COVID-19, and the "enhanced screen" could truly protect pets from COVID-19. Applying Logan and Clorox, where companies advertised explicitly untrue statements about its products' contents, SAFERover's organic claims are not explicitly inaccurate, because its stroller does contain some organics, and the safety claims could be true because of the safety screen. Eastman said the Fifth Circuit has not adopted the necessary implication doctrine where consumers would recognize a false claim in the entirety of an ad "as if it had been explicitly stated," and it would not need to because the jury found literal falsity. 775 F.3d at 240-41. Similarly here, this court should not adopt the necessary implication

doctrine because the UL logo is true. Under <u>Logan</u>, <u>Eastman</u>, and <u>Clorox</u>, SAFERover's few factual statements are true because they are supported by the evidence.

C. SAFERover's Ad Did Not Mislead Consumers, Because It Did Not Imply A False Message, And Evidence Shows No Consumer Deception Because Eighty-Six Percent Does Not Display A Substantial Portion Of Consumers Were Misled.

SAFERover's true statements did not mislead because the ad did not imply false messages, and surveys showed only fourteen percent of consumer confusion. To prove a true or ambiguous statement misled, plaintiff must show an advertisement made an impliedly false claim that deceived a substantial portion of consumers with evidence of confusion through consumer surveys. Pizza Hut, 227 F.3d at 497; Ill. Tool Works, Inc. v. Rust-Oleum Corp., 955 F.3d 512, 518 (5th Cir. 2020); Clorox, 228 F.3d at 36; Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 594 (3d Cir. 2002); see IQ Prod., 305 F.3d at 375 (stating a company deceived as shown by "evidence of consumer reaction"). In Pizza Hut, Papa John's compared its "better" ingredients to Pizza Hut's ingredients. 227 F.3d at 499. In Illinois Tool Works, a reviewer "surprisingly" found a product lasted forty-four washes, instead of the advertised 100. 955 F.3d at 518. In Clorox, twenty to forty-seven percent of consumers believed they only needed Ace to whiten and not bleach. 228 F.3d at 37. In Novartis, a flawed survey showed "25% of respondents" wrongly believed a sleep medicine named "Night-time" provided all-night relief. 290 F.3d at 584.

<u>Pizza Hut</u>, 227 F.3d at 501, reasoned the jury could find ingredients were essentially identical, and "better" was impliedly false without support concluding Papa John's pizza tasted better, and <u>Illinois Tool Works</u>, 955 F.3d at 518, stated the reviewer's

surprise "might show confusion," but both courts decided on materiality. <u>Clorox</u>, 228 F.3d at 37, and <u>Novartis</u>, 290 F.3d at 591, decided twenty to forty-seven percent and twenty-five percent survey evidence proved the ads "deceive[d] a substantial portion" of consumers. <u>Novartis</u> concluded even discounting to fifteen percent for a poorly conducted survey that "15% confusion is sufficient to demonstrate actual confusion" for an injunction. 290 F.3d at 594. Courts find an impliedly false statement misled when there is proof of notable consumer confusion through surveys or testimony.

This court should find SAFERover's true statements did not imply a false message which misled consumers, and PetRover did not prove substantial consumer confusion. Unlike in Pizza Hut, where Papa Johns claimed better ingredients without support and Illinois Tool Works where a product advertising lasting 100 washes might show confusion, SAFERover noted lower price, a safety screen, and customization. Like Illinois Tool Works, where a reviewer found the product lasted less washes, and Clorox, where twenty to forty-seven percent of respondents thought Ace sufficiently whitened, some PetRover customers asked for a discount saying SAFERover was the cheaper, organic stroller, a wholesaler mistook the strollers, and fourteen percent of consumers thought SAFERover's stroller was solely organic and safe or safer than PetRover's stroller. Unlike Pizza Hut, where Papa Johns compared ingredients without proof, SAFERover advertised UL certification pending. Unlike Clorox and Novartis, where twenty to forty-seven percent of consumers mistakenly thought Ace contained whitener, and at least fifteen percent wrongly believed a product provided all-night relief, only fourteen percent of respondents believed SAFERover's stroller was solely organic.

Applying <u>Pizza Hut</u> and <u>Illinois Tool Works</u>, where "better ingredients" and 100 washes were or could have been misleading, SAFERover did not expressly state stroller superiority or imply falsity, but instead offered an enhanced screen, cupholders, and customization options for a lower price. Unlike <u>Pizza Hut</u>, where stressing "better" without proof misled, SAFERover never claimed it was UL certified, but stated a pending application. Using <u>Clorox</u> and <u>Novartis</u> where evidence of "15% [consumer] confusion" was "sufficient" for actual confusion evidence and twenty to forty-seven percent was substantial, as noted, SAFERover's stroller contained organics and an enhanced screen, and fourteen percent of confused consumers is not substantial and below fifteen percent.

Applying <u>Illinois Tool Works</u>, where a reviewer's reaction might show confusion, some PetRover customers requesting discounts and wholesalers mistaking products is distinguishable because customers are not as knowledgeable as a reviewer, and fourteen percent confused consumers is not definitive. PetRover argued customers requesting discounts shows confusion. However, <u>Illinois Tool Works</u> only reasoned the reviewer "might" show confusion, plus stroller customers may not have been confused, but instead were seeking a cheaper stroller. Under these courts, SAFERover's advertisement did not mislead consumers because statements did not demonstrate implied falsity, and PetRover did not assert sufficient evidence the true statements confused consumers.

SAFERover's ad contains non-actionable puffery and does not contain false or misleading statements or consumer confusion evidence, and although SAFERover conceded on commerce, materiality, and injury, PetRover did not prove falsity and consumer deception. This court should affirm.

Applicant Details

First Name Emily
Middle Initial R
Last Name True

Citizenship Status U. S. Citizen

Email Address <u>emily.true@nyu.edu</u>

Address Address

Street

1 Irving Place, Apt. P14C

City New York State/Territory New York

Zip 10003 Country United States

Contact Phone Number 9258190132

Applicant Education

BA/BS From University of Pennsylvania

Date of BA/BS **December 2016**

JD/LLB From New York University School of

Law

https://www.law.nyu.edu

Date of JD/LLB May 18, 2022

Class Rank School does not rank

Law Review/Journal Yes

Journal(s) Review of Law & Social Change

Moot Court Experience No

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships Yes

Post-graduate Judicial Law Clerk

No

Specialized Work Experience

Recommenders

Brown, Rebecca rbrown@law.usc.edu 213-740-1892 Deger-Sen, Samir Samir.deger-sen@lw.com 212-906-4619 Burns, Sarah burns@mercury.law.nyu.edu 212-998-6464

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 07, 2023

The Honorable Juan Sanchez James A. Byrne United States Courthouse 601 Market Street, Room 14613 Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Please consider my application for a clerkship in your chambers for the 2024-2025 term. I graduated from the New York University School of Law in May 2022. I was lucky to spend my undergraduate years in Philadelphia and would be thrilled to return to the city as a judicial clerk.

I currently work as an Associate at Latham & Watkins LLP and previously served as a Managing Editor of the *N.Y.U. Review of Law & Social Change* during the 2021-2022 academic year. I feel these experiences have prepared me to be a diligent and resourceful clerk.

Enclosed please find my resume, law school transcripts, and writing sample. My writing sample is a memorandum I wrote as part of my fieldwork for the NYU School of Law Reproductive Justice Clinic. It addresses the legal standards South Dakota state courts use to assess equal protection challenges. My recommendation letters are from Rebecca Brown, Sarah E. Burns, and Samir Deger-Sen. Rebecca Brown is a professor at USC Gould School of Law; she was my professor for my first-year constitutional law course, and I was also her research assistant for the summer of 2020. Sarah E. Burns is a clinical professor at NYU School of Law who taught and supervised me in the Reproductive Justice Clinic at NYU. Samir Deger-Sen is a partner at Latham & Watkins LLP who has overseen my work on multiple litigation matters.

I would welcome the opportunity to discuss my qualifications and am available for an interview at your convenience. Thank you for your time.

Respectfully, /s/ Emily True

EMILY ROSE TRUE

emily.true@nyu.edu • 925-819-0132

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY

Juris Doctor, May 2022 Unofficial GPA: 3.63

Honors: Review of Law and Social Change, Managing Editor

Review of Law and Social Change Stewardship Award

Activities: Transfer Student Committee (President); American Constitution Society (Board Member)

UNIVERSITY OF SOUTHERN CALIFORNIA GOULD SCHOOL OF LAW, Los Angeles, CA

Matriculated August 2019 - May 2020

Honors: Southern California Law Review, Invitation Extended

USC Gould Merit Scholarship Recipient

High Honors Grade in Legal Research, Writing and Advocacy

Honors Grades in Civil Procedure and Contracts

Activities: American Constitution Society; Public Interest Law Foundation; Gould Philosophy Society

UNIVERSITY OF PENNSYLVANIA, Philadelphia, PA

Bachelor of Arts, magna cum laude, Political Science with Middle Eastern Studies Minor, December 2016

Honors: Pi Sigma Alpha Political Science Honors Society

Friars Senior Society, recognizing on-campus leadership

Activities: Performing Arts Council Executive Board; Counterparts A Cappella; Political Science Research Assistant

EXPERIENCE

LATHAM & WATKINS LLP, New York, NY

Associate, October 2022 – present, Legal Intern, July 2021 – April 2022, and Summer Associate, May 2021 – July 2021 Research and draft memoranda on English common law and Founding Era law for Supreme Court briefing and oral argument. Prepare witness interview outlines for antitrust investigation. Interview potential plaintiffs and draft plaintiff declarations for First Amendment academic freedom litigation.

NYU REPRODUCTIVE JUSTICE CLINIC, New York, NY

Clinic Student, August 2021 - May 2022

Produced memorandum on how state courts assess expert testimony for organizational client litigating in state court. Drafted section of a response motion in opposition to defendants' motion to exclude expert testimony and cite checked full motion. Researched and drafted memorandum on how state courts assess facial challenges and possible procedural and constitutional challenges to currently enforced statutes.

BRENNAN CENTER FOR JUSTICE, New York, NY

Legal Intern, Democracy Program, January 2021 – April 2021

Reviewed draft voting rights legislation to assess amendments and changes to legislative language. Compiled case law on board of elections lawsuits. Wrote memorandum assessing constitutionality of state tax on digital advertising. Cite-checked congressional testimony. Assisted with Center events on judicial diversity and inclusion.

THE HON. SIDNEY H. STEIN, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, New York, NY *Judicial Intern*, June 2020 – August 2020

Conducted legal research on civil and criminal issues and drafted memoranda and opinions for chambers. Cite-checked judicial opinions before filing. Attended remote and in-person court proceedings and hearings.

PROFESSOR REBECCA BROWN, USC GOULD SCHOOL OF LAW, Los Angeles, CA

Research Assistant, June 2020 – August 2020

Compiled relevant data and scholarship and drafted outline for Professor Brown's article on the lack of meaningful constitutional constraints on the presidency. Reviewed executive orders and presidential actions taken using statutory powers delegated by Congress.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP, New York, NY

Litigation Paralegal, August 2017 – June 2019

Supervised paralegal teams and managed projects for partners and associates. Served as senior paralegal on Voting Rights Act case and oversaw three-week preliminary injunction hearing, depositions, and discovery. Created organizational infrastructure for class action immigration lawsuit. Performed fact research and compiled data for FCPA practice group publications.

ADDITIONAL INFORMATION

Volunteer as a clinic escort for an NYC abortion clinic. Interests include reading, singing, and baking.

 Name:
 Emily R True

 Print Date:
 05/08/2023

 Student ID:
 N19314177

 Institution ID:
 002785

 Page:
 1 of 1

New York University Beginning of School of Law Record										
Degrees Awarded Juris Doctor 05/18/2022 School of Law Major: Law										
	Transfer Credit	s								
Transfer Credit from Applied to Fall 20	Transfer Credit from Univ Southern California									
<u>Course</u>	Description			Ţ	<u>Jnits</u>					
LAW 502 LAW 503	Contracts Procedure				4.0 4.0					
LAW 503 LAW 504	Criminal Law				3.0					
LAW 507	Property				4.0					
LAW 508	Constitutional Law				3.0					
LAW 509 LAW 531	Torts Ethical Issues for Pu	blic Into			4.0 3.0					
LAW 551	Transfer Tota				25.0					
Transfer Credit fre	om Univ of Southern Calif	/I aw								
Applied to Fall 20		Law								
Course	<u>Description</u>			Ţ	<u>Jnits</u>					
LAW 515 LAW 516	Legal Research Legal Research				3.0 2.0					
L/W 510	Transfer Tota	als:			5.0					
	Fall 2020									
School of Law	Fall 2020									
Juris Doctor										
Major: Law										
The Law of Democ	,	LAW-LW	10170	4.0	B+					
Legislation and the		LAW-LW	11633	4.0	B+					
	Roderick M Hills lse Advertising Law	LAW-LW	11923	4.0	В					
Instructor: Domestic Violence	Barton C Beebe Law Seminar	LAW-LW	12718	2.0	Α					
Instructor:	Emily Joan Sack									
Current			<u>AHRS</u> 14.0		<u>HRS</u> I4.0					
Current			14.0		14.0 14.0					
Camalativo			11.0							
School of Law	Spring 2021									
Juris Doctor Major: Law										
Corporations		LAW-LW	10644	4.0	A-					
Instructor:	Ryan J Bubb									
	orm: Law, Policy and Politic	s LAW-LW	11371	2.0	Α					
Seminar Instructor:	Mary Ann Chirba									
Evidence	Mary Arm Ormba	LAW-LW	11607	4.0	A-					
Instructor:	Daniel J Capra									
Supreme Court Se		LAW-LW	12064	2.0	Α					
Instructor:	Troy A McKenzie Yaira Dubin									
	Sina Kian									
Lawyering for Tran		LAW-LW	12627	3.0	CR					
Instructor:	Gary Michael Parsons		<u>AHRS</u>	Er	HRS					
Current			15.0		15.0					
Cumulative			29.0		59.0					

	Fall 2021				
School of Law Juris Doctor Major: Law					
Criminal Procedure: Amendments	Fourth and Fifth	LAW-LW	10395	4.0	B+
Instructor: Family Law	Andrew Weissmann	LAW-LW	10729	4.0	Α
Instructor: Reproductive Justic Instructor:	Melissa E Murray e Clinic Sarah E Samuels	LAW-LW	12261	3.0	Α
Reproductive Justic	Sarah E Burns	LAW-LW	12262	3.0	Α-
Instructor:	Sarah E Samuels Sarah E Burns				
Current			AHRS 14.0	1	4.0
Cumulative			43.0	7	3.0
	Spring 2022				
School of Law Juris Doctor Major: Law					
Federal Courts and Instructor:	the Federal System David M Golove	LAW-LW	11722	4.0	B+
Review of Law & So		LAW-LW			CR
Advanced Reproduction:	ctive Justice Clinic Sarah E Samuels Sarah E Burns	LAW-LW	12333	3.0	Α
Advanced Reproduction:	ctive Justice Clinic Seminar Sarah E Samuels	LAW-LW	12334	2.0	Α
	Sarah E Burns		AHRS	FL	IRS
Current			11.0		1.0
Cumulative			54.0	8	4.0
	of Law & Social Change 2 eview of Law & Social Char		2022		
	End of School of Law				

On-line Academic Student Information System





Unofficial Transcript

ID#: 8899404276



Last Name First Name True Emily

Unofficial Transcript

	Current Degree Objective		
MAJOR	Degree Name Unknown	Degree Title	
WAJOR	Olikilowii		

Cumulative GPA through 20202									
	Uatt Uern Uavl Gpts GPAU GPA								
UGrad	0.0	0.0	0.0	0.00	0.0	0.00			
Grad	0.0	0.0	0.0	0.00	0.0	0.00			
Law	36.0	36.0	36.0	57.80	16.0	3.61			
Other	0.0	0.0	0.0	0.00	0.0	0.00			

Fall Term 2019							
С	ourse	Units Earned	Grade	Course Description			
LA	W-530	1.0	CR	Fundamental Business Principles			
LA	W-515	3.0	4.1	Legal Research, Writing, and Advocacy			
LA	W-509	4.0	3.1	Torts I			
LA	W-503	4.0	3.5	Contracts			
LA	W-502	4.0	3.8	Procedure I			

Spring Term 2020							
Course	Units Earned	Grade	Course Description				
LAW-531	3.0	CR	Ethical Issues for Public Interest, Government and Criminal Lawyers				
LAW-516	2.0	CR	Legal Research, Writing, and Advocacy				
LAW-508	3.0	CR	Constitutional Law: Structure				
LAW-507	4.0	CR	Property				
LAW-504	3.0	CR	Criminal Law				

Summer Term 2020						
Course	Units Earned	Grade	Course Description			
LAW-790	1.0	3.9	Legal Externship			
LAW-781	4.0	CR	Externship I			

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW JD CLASS OF 2022 AND EARLIER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

The following guidelines represent NYU School of Law's guidelines for the distribution of grades in a single course. Note that JD and LLM students take classes together and the entire class is graded on the same scale.

A + = 0-2%	A = 7-13%	A- = 16-24%				
B+ = 22-30%	B = Remainder	B- = 0-8% (First-Year JD); 4-11% (All other JD and LLM)				
C/D/F = 0-5%	CR = Credit	IP = In Progress				
EXC = Excused	FAB = Fail/Absence	FX = Failure for cheating				
*** = Grade not yet submitted by faculty member						

Maximum for A tier = 31%; Maximum grades above B = 57%

The guidelines for first-year JD courses are mandatory and binding on faculty members. In all other cases, they are advisory but strongly encouraged. These guidelines do not apply to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students taking the course for a letter grade.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:Top ten students in the class after two semestersButler Scholar:Top ten students in the class after four semesters

Florence Allen Scholar: Top 10% of the class after <u>four</u> semesters Robert McKay Scholar: Top 25% of the class after <u>four</u> semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW JD CLASS OF 2022 AND EARLIER & LLM STUDENTS

semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process for all NYU School of Law students is highly selective and seeks to enroll individuals of exceptional ability. The Committee on Admissions selects those candidates it considers to have the very strongest combination of qualifications and the very greatest potential to contribute to the NYU School of Law community and the legal profession. The Committee bases its decisions on intellectual potential, academic achievement, character, community involvement, and work experience. For the Class entering in Fall 2020 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 172/167 and 3.9/3.7. Because of the breadth of the backgrounds of LLM students and the fact that foreign-trained LLM students do not take the LSAT, their admission is based on their prior legal academic performance together with the other criteria described above.

Updated: 9/14/2020

June 07, 2023

The Honorable Juan Sanchez James A. Byrne United States Courthouse 601 Market Street, Room 14613 Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing at the request of Emily True, a remarkable student who is seeking a clerkship in your chambers. I offer to you my highest recommendation of Emily as a student and potential clerk.

Emily was my student in Constitutional Law her first year of law school, when the semester was interrupted by a shut-down after spring break due to COVID. Fortunately, I had already gotten to know Emily quite well as an absolute standout in the class, and had come to admire her deeply before our physical contact was eliminated. Online, those positive impressions only grew stronger.

Emily's love for politics and law came out clearly in my class, as we discussed many issues of the day in connection with our study of structural constitutional law. Emily was knowledgeable, engaged, distinctively bright and thoughtful, hard-working, and enthusiastic. I was so impressed with her performance in class, in fact, that I asked her to be my research assistant for the summer, without ever opening it up to general applications.

That summer, she was the best research assistant I have ever had. The first set of materials that she produced for me showed that she understood in depth the project that I was undertaking, her mastery of legal research and analysis, and most of all an impressive, pro-active work ethic. She did a great deal for me in addition to her full-time judicial internship with a judge on the Southern District of New York.

I was particularly impressed with her desire and ability to think independently about my project and offer her own ideas and solutions to challenges that we faced in structuring the paper. She contributed substantively in ways that I would not have expected a 1L student to be able to do.

In addition to her impressive work in class, Emily was active in important student organizations while at USC and showed leadership among her peers both in and out of class. Needless to say, I was devastated when she told me of her decision to transfer to NYU. They were very lucky to get her, as I believe your chambers would be as well. I had the privilege of being a law clerk to two federal judges long ago, one on the D.C. Circuit and the other Justice Thurgood Marshall. Those life-altering experiences taught me a great deal about what makes a good judicial clerk, and I believe Emily possesses those qualities, which essentially boil down to intellectual talent and the personal qualities to make the most of it. I whole-heartedly recommend her.

Sincerely,

Rebecca L. Brown
The Rader Family Trustee Chair in Law